93-279

No:

AUG 23 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN N. WITTEKAMP

Petitioner,

vs.

GULF & WESTERN, INC.;
GULF & WESTERN INDUSTRIES, INC.;
GULF & WESTERN MANUFACTURING CO.;
and WICKS MANUFACTURING

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LOUIS M. TARASI, JR., ESQUIRE
Counsel of Record

TARASI & JOHNSON, P.C.
510 Third Avenue
Pittsburgh, PA 15219
(412) 391-7135

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Third Circuit's experimental use of video-tape as the official record of District Court proceedings deprived the Petitioner of his right of appeal.

2. Whether the United States Court of Appeals for the Third Circuit's ruling affirming the District Court's improper granting of the Respondents', (Defendants'), motion for judgment as a matter of law, in regards to the vested retiree medical benefits fraud claim, at the close of all of the evidence, after denying such motion at the close of Petitioner's, (Plaintiff's), case in chief, has violated the Petitioner's Seventh Amendment right to trial by jury by improperly engaging in de novo review and by making two impermissible findings of fact.

3. Did the trial judge deprive the Plaintiff of his Fifth Amendment due process Rights to counsel and vindication and his Seventh Amendment Right to trial by jury by charging the jury that statements made by Plaintiff's counsel during closing argument were incorrect and improper and was it error for the Third Circuit Court of Appeals to sanction the jury charge?

4. Was it reversible error, a violation of the Federal Rules of Appellate Procedure and a violation of the Petitioner's due process rights for the Court of Appeals for the Third Circuit to review a written transcript of the District Court proceedings that was not the official record and not provided by the District Court but in fact provided by the Respondents after the appellate oral argument took place?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement Of Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
A. Right Of Appeal	2
B. Due Process Rights to Counsel and Vindication	3
C. Right to trial by jury and the right to have to have the factual issues examined by a jury	3
D. Federal Rules of Appellate Procedure requirement that the transcript of the District Court proceedings be filed with the District Court and transmitted to the Court of Appeals by the clerk of the District Court	4
Statement of the Case	4
A. Factual Statement	5
B. Procedural History	9
Reasons For Granting the Writ	12
I. The Third Circuit Court of Appeals' experimental use of video tape as the official record of the District Court hearing has deprived the Petitioner of his Right of Appeal	12
II. The Third Circuit panel has deprived the Petitioner of his Fifth Amendment Rights to Counsel and Vindication and his Seventh Amendment Right to trial by jury	16

A. The Third Circuit by engaging in de novo review and making impermissible findings of fact has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision 16

B. The Third Circuit Court of Appeals has sanctioned a district court jury charge that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision 25

III. The Court of Appeals for the Third Circuit's use of an unofficial written trial transcript, provided by the Appellees, after the oral argument took place in order to review the record below violated the Federal Rules of Appellate Procedure and the Petitioner's due process Rights 28

Conclusion 29

TABLE OF CITATIONS

Cases Cited:

Amadeo v. Zant, 486 US 214, 100 L. Ed. 2d 249, 108 S. Ct. 1771 (1988) 18

Barrett v. United States, 798 F.2d 565 (2nd.Cir. 1986) 13, 25

Bentivoglio v. Ralston, 399 Pa. 419, 288 A.2d 745 27

Conner v. Cresent Lighting Corp., 61 F.R.D. 62 (E.D. Pa. 1973) 27

Icicle Seafoods, Inc., v. Worthington, 475 US 709, 89 L. Ed. 739, 106 S. Ct. 1527 (1986) 18

National Bldg. Leasing, Inc., v. Byler, 252 Pa.Super. 370, 381 A.2d 963, 966 (1977) 23

Oscanyan v. Arms, 103 U.S. 261 (1880) 8

Perciavalle v. Smith, 434 Pa. 86, 252 A.2d 702 (1969) 6

Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th.Cir. 1980), US Cert.Den. 449 US 820 ..... 13, 25

Powell v. State of Alabama, 287 US 45, 53 S.Ct. 55 (1932) 13, 25

Shillington v. K-Mart Corp., 102 N.C. App. 187, 402 S.E.2d 155 (1991) 12, 13

University of Maryland v. Peat Marwick Main & Co., 923 F.2d 265, 275 (3d Cir. 1991) 17

Weigand v. American Stores Company, 346 Pa. 253, 29 A.2d 484 (1943) 7, 28

Statues Cited:

28 U.S.C.S. § 1254(1) 2

28 U.S.C.S. § 1291 ..... 2, 12

28 U.S.C.S. § 1332 9

28 U.S.C.S. § 2072 ..... 3, 13

United States Constitution Cited:

Article III, Section 1 ..... 2, 12

Fifth Amendment 3, 13, 25

Seventh Amendment 4, 13, 17, 25, 29

Rule Cited:

Supreme Court Rule 13.4 2

Federal Rules of Appellate Procedure Rule 10(a) 4, 12, 28

Federal Rules of Appellate Procedure Rule 11(b) 4, 12, 28

Third Circuit Rule 21 ..... 9, 11, 28

Other Authority, Books and Reviews Cited:

America What Went Wrong ?, Andrews and McKeel, A Universal Press Syndicate Company, Kansas City, 1992 7

Electronic recording fails test, The Florida Bar Journal, January, 1981 13

Judicature, vol 59, no 5 Dec 1975 14

Videotape Project Criticized in Ky., The National Law Journal, July 24, 1989 13

Videotaped Trial Transcripts and Appellate Review: Are Some Courts Favoring Form Over Substance?, The Wayne Law Review, Vol. 38, page 1639 (1992) 13

Wigmore on Evidence 3rd. Ed., §1071 ..... 7, 28

No:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN N. WITTEKAMP

Petitioner,

vs.

GULF & WESTERN, INC.;
GULF & WESTERN INDUSTRIES, INC.;
GULF & WESTERN MANUFACTURING CO.;
and WICKS MANUFACTURING

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, (Appendix "A"-1), is reported at 991 F.2d 1137 (3d Cir. 1993). The United States District Court for the Western District of Pennsylvania did not issue written opinions concerning its decisions on the matters at issue in this Petition, but it did make statements on tape concerning the reasons for its decisions that have been reduced to writing, (A-18, 19, 25 and 27). The memorandum opinion of United States District Court for the Western District of Pennsylvania denying both the Plaintiff's and the Defendants' Motions for Summary Judgment, (A-30), is reported at 788 F.Supp. 246 (W.D.Pa. 1992).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on April 22, 1993, (A-16), affirming the decision of the District Court but on different grounds. A petition for rehearing was timely filed and was denied on May 24, 1993, (A-34). This petition for a writ of certiorari was filed within 90 days of that date pursuant to Supreme Court Rule 13.4. This Court has jurisdiction to review the Third Circuit decision by writ of certiorari pursuant to 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Right of Appeal

Article III, Section 1, of the Constitution of the United States of America states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Court, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The statutory provision 28 U.S.C.S. § 1291 states:

> The courts of appeals (other than the United States Courts of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the Unites States District Court for the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be lim-

ited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

The statutory provision 28 U.S.C.S. § 2072 states:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under 1291 of this title.

B. Dues Process Rights to Counsel and Vindication

The Fifth Amendment to the Constitution of the United States of America states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

C. Right to trial by jury and to have the factual issues examined by a jury.

The Seventh Amendment to the Constitution of the United States of America states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

D. Federal Rules of Appellate Procedure requirement that the transcript of the District Court proceedings be filed with the District Court and transmitted to the Court of Appeals by the clerk of the District Court.

Federal Rules of Appellate Procedure Rule 10(a), Composition of the Record on Appeal states:

> The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

Federal Rules of Appellate Procedure Rule 11(b), Duty of Reporter to Prepare and File Transcript; Notice to Court of Appeals; Duty of Clerk to Transmit the Record can be found at (A-44).

STATEMENT OF THE CASE

The Petitioner, John N. Wittekamp has filed this writ of Certiorari because the experimental use of video-tape as the official transcript of the District Court trial has deprived him of his right of appeal and because the United States Court of Appeals for the Third Circuit has violated his Constitutional rights; 1) by engaging in de novo review when the standard of review was plenary; 2) by engaging in impermissible fact finding; 3) by setting a new and unconstitutional standard for justifiable reliance in a common law fraud action; 4) by sustaining an improper and highly prejudicial jury charge by the District Court Judge; and 5) by reviewing a written transcript of the trial proceedings which was not made part of the official record of

the case and was not transmitted by the district court clerk but was transmitted to the Third Circuit by the Respondents, (Appellees).

A. Factual Statement

In 1982, the Petitioner, John N. Wittekamp, became President of Mackintosh-Hemphill ("Mack-Hemp") a steel producing division of Gulf & Western Manufacturing Co., (Gulf & Western), located in the Pittsburgh, Pennsylvania area. Wittekamp was recruited by Gulf & Western and lured away from his position at Ward '79, a fire engine manufacturing company located in Elmira, New York. In April of 1983 representatives of Gulf & Western approached Wittekamp about purchasing the Mack-Hemp division, and on October 17, 1983, a corporation started by Wittekamp, MHJW Corporation, purchased the division by way of a leveraged buy out, with Wittekamp as President. Under the purchase agreement, Wittekamp's corporation and Gulf & Western allocated certain obligations of Gulf & Western with respect to the Mackintosh-Hemphill Division including certain obligations and liabilities arising under various collective bargaining agreements between the division and the unions representing its employees and retirees.

In connection with this purchase, Wittekamp inquired as to the existence of vested benefits for retirees. All parties agree Wittekamp was informed concerning the vested pension plan. In fact Wittekamp knowingly assumed the vested pension plan for (Mack-Hemp), and negotiated the purchase price to reflect that fact. The critical issue of this case is whether the Defendants knew that the retiree medical benefits were vested in an amount in excess of $11 Million before the sale and withheld that information from Wittekamp.

To determine if the retiree medical benefits were vested. Wittekamp, familiar with labor negotiations and agreements, testified that he researched all documents provided to him by Gulf & Western relevant to labor agreements before the purchase and concluded that the retiree medical benefits were not vested. Wittekamp also negotiated the Bill of Sale which specifically holds Gulf & Western liable for all liabilities relating to any medical or dental insurance plan of the division which vested on or before October 17, 1983, the date of sale[1].

To further verify his belief that the retiree medical benefits were not vested Wittekamp asked at the closing in New York if there were any vested benefits for retirees and he was told no, by representatives of Gulf & Western. Based on his diligently researched conclusion that the retiree medical benefits were not vested, the fact that the Bill of Sale made Gulf & Western liable for any medical and dental insurance plan of the Division which vested prior to the sale and the fact that representatives for Gulf & Western told him that retiree benefits were not vested, Wittekamp, extended the labor agreement that was to expire on January 31, 1984, to January 31, 1987, so that his new company would not have to worry about any immediate labor unrest.

During the trial, Wittekamp's diligently researched belief that the retiree medical benefits were not vested was supported by the evidence as being reasonable and justified. In fact, evidence was presented during the trial that four of the Defendants own lawyers supported Wittekamp's position. Cary Beane, Gulf & Western Inc.'s in house labor law expert at the time of the sale, the person that actually provided the labor agreements to Wittekamp in conjunction with purchase, and the person that testified that Gulf & Western was liable for any labor agreements, obligations and liabilities that vested on or before October 17, 1983, (*see, footnote "Fn" 1*), stated under oath that if he were asked in 1983, if the retiree medical were vested, he would have

---

[1]During cross examination Cary Beane, Esquire, Gulf & Western's in house labor law expert at the time of the sale was questioned on the following passage of Defendants' Exhibit 196, authored by Mr. Beane, which stated: "The seller is relieved of any and all responsibilities, obligations and liabilities with respect to the labor agreement, pension plan, insurance plan, supplemental unemployment benefit plan, apprenticeship programs (where applicable) and any local agreements **which may arise on or after October 17, 1983**". After reviewing Exhibit 196, Mr. Beane was asked the question "So, I gather from that language, Mr. Beane, that anything that occurred before October 17, 1983 in the regard to the things enumerated above would still be the obligation of the seller, isn't that right?". To which Mr. Beane responded, "Correct". This is an admission by the Defendants that they are liable for any and all retiree medical benefits that vested prior to October 17, 1983, see, Perciavalle v. Smith, 434 Pa. 86, 252 A.2d 702 (1969). Furthermore, the Defendants, by and through their attorney Marc Goldstein admitted during the trial that the retiree medical benefits were vested prior to October 17, 1983, when Marc Goldstein, Esquire, stated: "We [the Defendants] are conceding it was there, Your Honor, and that the tenor of the documents at all times and in everyone's hands and for everyone's viewing was that the benefits were vested benefits".

stated, "No, not to my knowledge they are not". Lisa Revlin, in house counsel for Gulf & Western Manufacturing in an affidavit dated August 6th, 1987, that was read to the jury and submitted as evidence stated "No explicit language in any collective bargaining agreement or other related document ever imposed upon G&W Manufacturing any irrevocable obligation to maintain such a [retiree medical] plan in effect indefinitely". Wittekamp during the trial testified that both of the Defendants' trial attorneys, Michael Cardozo, Esquire and Marc Goldstein, Esquire, told him during a 1987 meeting that the retiree medical benefits were not vested[2]. Not until Wittekamp attempted to terminate the retiree medical benefits in an effort to increase investment and profitability in his company did he discover that there was an issue as to whether his company was liable for vested retiree medical benefits. When Wittekamp terminated the retiree medical benefits at the end of the negotiated labor agreement extension his company was sued, forced into bankruptcy, and Wittekamp was forced to make good on personal guarantees, lost his job, home, became personally liable for guaranteed Mack-Hemp notes and suffered other substantial damages. The Defendants caused the financial destruction of Wittekamp and his company by withholding facts, known to them, regarding the retiree medical benefits. The Defendants sealed the fraud by telling Wittekamp intentionally or recklessly at the closing that there were no vested benefits for retirees[3].

Through discovery in this case and by the judicial admission of Defense counsel, during opening argument, evidence was presented

---

[2]Neither Cardozo or Goldstein took the stand to deny that they told Wittekamp the retiree medical benefits were not vested, therefore they both acquiescence to Wittekamp's testimony *see, Weigand v. American Stores Company*, 346 Pa. 253, 29 A.2d 484, 486 (1943); and *Wigmore on Evidence 3rd. Ed.*, §1071.

[3]Neil Feloa, one time president and chief executive officer of Gulf & Western Manufacturing described the motive why Gulf & Western did not tell Wittekamp before the sale that the retiree medical benefits were vested. It was because Gulf & Western was too large to go bankrupt and G&W would lose over $30 Million if it closed the Mackintosh-Hemphill division. It was in G&W's best interest to sell the division to an investor that could go bankrupt thus relieving G&W of any future liability in regards to the division. *see, America What Went Wrong ?*, Andrews and McKeel, pp 123- 142, *"End of the American Dream"*, A Universal Press Syndicate Company, Kansas City, 1992.

during the trial establishing that the Defendants knew that the retiree medical benefits were vested before the sale of Mack-Hemp:

> 1) Exhibit 98, the Program of Hospital and Physician' Service Benefits for Eligible Pensioners and Surviving Spouses Not Eligible for Medicare, effective date, 1975, (**produced from Gulf & Western's files during discovery**), both parties agree, if in effect would indicate that the retiree medical benefits were vested[4], (This document was never shown to Wittekamp prior to the sale of Mack-Hemp).
>
> 2) Defense attorney Michael Cardozo, Esquire, stated during his opening argument that Gulf & Western paid retiree medical benefits during the 1977-78, strike[5]. This is evidence that Defendants knew that Exhibit 98 was in effect and that they knew they were obligated to pay retiree medical benefits even though no labor contract agreement was in effect.
>
> 3) Plaintiff had two witnesses state under oath that Exhibit 98 was a valid and binding document that vested the retiree medical benefits.
>
> 4) Rudy Hertlein, the executive vice president of Gulf & Western at the time of the sale of MacK-Hemp prepared a document entitled *Mackintosh-Hemphill estimated Gain (Loss) on Disposal.* In this document Rudy Hertlein wrote. **"Buyer will assume the union contract, including retiree medical of approximately $11.1 Million".** (emphasis added). Proving he knew that the retiree medical benefits were vested and that the union benefits contract, Exhibit 98, was in effect.

---

[4]During cross examination, Cary Beane, at one time Gulf & Western's director of group labor relations when read the Continuation of Coverage clause in Exhibit 98, was asked "That indicates that this [the Program of Hospital and Physicians' Services Benefits] would go on after the agreement came to an end, correct, Sir?" to which Beane replied "Correct".

[5]A judicial admission see, Oscanyan v. Arms, 103 U.S. 261 (1880).

B. Procedural History

Petitioner, John N. Wittekamp, commenced this action in the Court of Common Pleas of Allegheny County, Pennsylvania. The two relevant allegations of the action were; 1) that the Defendants fraudulently induced him into leaving his previous employment to take the position of President of Gulf & Western's Mackintosh-Hemphill division by misrepresenting the profitability and stability of the division and 2) that the Defendants fraudulently induced him into purchasing the Mackintosh-Hemphill division by misrepresenting, concealing and failing to disclose the fact that the retiree medical benefits were vested. Thereafter, the defendants removed this case to the United States District Court for the Western District of Pennsylvania, due to diversity of citizenship and because the amount in controversy was over $50,000 pursuant to 28 U.S.C.S. § 1332.

On April 1, 1992, the District Court denied cross motions for summary judgment citing a genuine dispute as to material issues of fact, (A-28, 30). Trial of this action began on July 7, 1992 and proceeded until July 24, 1992. The trial was video taped and according to Third Circuit Court of Appeals Rule 21(2).A.(i), (A-40), the video tape was the only official transcript of the trial. At the conclusion of the Plaintiff's case-in-chief, the Court denied the defendant's motion for judgment as a matter of law on the vested retiree medical benefits fraud claim, (A-27). Thereafter the Defendants put on their case-in-chief. At the conclusion of their case, the Defendants again moved for judgment as a matter of law on the vested retiree medical benefits fraud claim. This time the trial judge granted the motion on the basis that Wittekamp failed to establish scienter, i.e. that he failed to establish that the Defendants knowingly misrepresented, concealed and/or failed to disclose the fact that the retiree medical benefits were vested, (A-19).

The Judge took the vested retiree medical benefits fraud claim away from the jury based of the testimony of Rudy Hertlein, vice president of Gulf & Western at the time of the sale and now employed by Paramount Communication, Inc. the successor to Gulf & Western, and obviously an interested party[6]. By taking the vested

---

[6]The Judge made this decision even though exhibit "621", a document prepared

retiree medical benefits fraud claim away from the jury. The trial judge ruled as a matter of law that a jury could not reasonably disbelieve Hertlein's testimony. This is the case even though Hertlein was an interested party and even though his sworn testimony directly contradicts his written document, Exhibit 621, *see, Fn 6.*

The only question that went to the jury was whether the Defendants had fraudulently induced the Plaintiff, by affirmative misrepresentation or concealment, into giving up his previous employment to take the position of President of Mackintosh-Hemphill in 1982. The jury found in favor of the Defendants on this issue, (A-18), after the Judge made what the Petitioner believes a highly prejudicial and improper jury charge.

During the trial the Judge brought to counsels' attention that an unanticipated scheduling conflict had a risen. A criminal case that he presided over resulted in a hung jury and it had to be retried within a certain time period. Either counsel would have to streamline the case or the case would have to be put on hold for approximately two months. Wittekamp, not wanting his case prejudiced by a long delay, by and through his attorney, Louis M. Tarasi, Jr., Esquire, agreed to streamline the case by not calling to the stand some of his cumulative witnesses.

During closing arguments counsel for the Defense made a negative inference by commenting on the fact that the Plaintiff did not call to the stand some of his witnesses. These were the same cumu-

---

by Hertlein, before the sale, and found in Defendants' files during discovery, clearly states, **"Buyer will assume the union contract, including retiree medical of approximately $11,100,000.00".** The Judge found Hertlein's testimony that, "the 11.1 million has nothing to do with the ongoing operations. It is a shutdown analysis that is unrelated to the ongoing business.", to be very persuasive and in fact stated "In light of Mr. Hertlein's testimony, which was powerful on the issue of what the $11.1 million was, as a matter of fact, for the first time Gulf & Western has set forth a very clear position on what that $11.1 million was through Mr. Hertlein. **Up until his testimony, there was perhaps a legitimate dispute as to how that could be interpreted.** How is there now? How is there any dispute as to what that was? He was involved in the preparation of that document and that information", (emphasis added).

lative witnesses that Plaintiff's attorney did not call in deference to the Judge's request of counsel to streamline the case.

In order to vindicate the Plaintiff. The Plaintiff's attorney during his closing, told the jury that the witnesses were not called in deference to the Judge's request that the case be streamlined. The Judge told the jury that Plaintiff's attorney was incorrect. Also, during closing the Plaintiff's attorney commented on the fact that the trial attorneys for the Defendants had personal knowledge of material facts of the case and did not take the witnesses stand, this the District Court Judge told the jury was improper[7].

Thereafter, Wittekamp timely filed a Notice of Appeal on July 30, 1992, thereby preserving his right of appeal to the United States Court of Appeals for the Third Circuit. Briefs were timely filed and an oral argument on the matter took place on March 8, 1993. At the oral argument the Judges repeatedly complained of the difficulty in reviewing the trial testimony by video tape. No written official transcript was provided to the Court of Appeals pursuant to Third Circuit Rule 21(2).A.(i), (A-40). After the oral argument the Defendants provided the Court of Appeals with an unofficial copy of the trial proceedings in writing. Ultimately, the Circuit Court affirmed the trial court's decision, but not on the issue of scienter. The Court of Appeals sustained the district court decision on two completely new grounds.

First the Court of Appeals made the factual determination that Wittekamp retreated from his assertion that he asked at the closing whether retiree health benefits had vested and ruled that the District Court could not have let that question of oral misrepresentation go to the jury, (A-9,10,11). Second, the Court of Appeals made the factual determination that Wittekamp did not reasonably investigate whether the retiree medical benefits had vested in order to justifiably rely on the non-disclosure and sustained the District Court ruling on those grounds, (A-15). In reaching these decisions, the Court

---

[7]During the trial the Plaintiff, John N. Wittekamp, stated that both of the trial attorneys for the Defendants, Mr. Cardozo and Mr. Goldstein told him during a meeting in New York, that the retiree medical benefits were not vested.

overlooked the testimony and other events at trial that directly contradicted its recitation of facts and proceedings below.

Moreover, the panel did not address the issues as to the District Court Judge's jury charge concerning Plaintiff's attorney's closing argument. These are serious constitutional issues which the panel found without merit and did not address, (A-8). For these reasons the appellant timely filed a Petition for Re-hearing which was denied on May 24, 1993, (A-34). Furthermore, the panel reviewed an unofficial transcript, provided by the Respondents, (Appellees), that was not part of the permanent record in order to review the District Court proceedings, thus violating the Federal Rules of Appellate Procedure 10 and 11.

REASONS FOR GRANTING THE WRIT

I

THE THIRD CIRCUIT COURT OF APPEALS' EXPERIMENTAL USE OF VIDEO TAPE AS THE OFFICIAL RECORD OF THE DISTRICT COURT HEARING HAS DEPRIVED THE PETITIONER OF HIS RIGHT OF APPEAL.

The Petitioner, John N. Wittekamp, had the right to appeal the July 24, 1993, final decision of District Court in which the Defendants prevailed, pursuant to Article III, section 1 of the Constitution of the United States of America and 28 U.S.C.S. §1291. The use of video-tape as the official transcript of the District Court proceedings, the sole record on appeal, pursuant to Third Circuit Rule 21(2).A.(i), (A-40), denied the Petitioner his right of appeal by making it impossible for the appellate court to fairly review the district court proceedings. This is true especially when the sufficiency of evidence is to be reviewed on appeal[8]. The problem of effective appellate review of such proceedings becomes especially pronounced where, as in this case, the appellate court affirms the trial court decision on a completely different basis[9].

---

[8]*Shillington v. K-Mart Corp.*, 102 N.C. App. 187, 402 S.E.2d 155 (1991).

[9]The district court ruled as a matter of law Wittekamp did not establish scienter. The

The experimental use of video-tape as the official record has been a complete failure and has deprived the Petitioner of his right of appeal, his Fifth Amendment due process rights to counsel and vindication[10] and his Seventh Amendment right to trial by jury. This is the fact even though 28 U.S.C.S §2072, specifically states that Supreme Court rules of practice and procedure in civil actions and appeals "... shall not abridge, enlarge or modify any substantive right". The Third Circuit use of video tape has violated 28 U.S.C.S. §2072 by taking away the Petitioner's substantive right of appeal.

This Petition presents this Court with an opportunity to comment upon and correct the broad systemic problems with appellate review of video-taped trial records. Several courts and commentators have criticized the use of video-tape as the record for appellate review[11]. In fact, the state of Michigan, which has several county courtrooms using videotape as the official record, requires a written transcript to be included in the record on appeal because of the inability of videotape to make an efficient record for an appeal[12]. This Court has yet to consider the matter and should.

In this very case, during the appellate oral argument. Two of the panel judges complained quite bitterly on the use of video tape as the official transcript. The Court (per Judge Edward R. Becker) stated:

> I am speaking for Judge Greenberg, as well as myself, we being the two most vociferous opponents of this *crazy experiment*, as good as it might be in the

---

Third Circuit panel on the other hand made the factual determinations that Wittekamp retreated from testimony and failed to demonstrate justifiable reliance because he failed to reasonably research whether retiree medical benefits were vested.

[10]*see, Powell v. State of Alabama*, 287 US 45, 53 S.Ct. 55, 64 (1932); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th.Cir. 1980), *US Cert.Den.* 449 US 820; and *Barrett v. United States*, 798 F.2d 565, 575 (2nd.Cir. 1986).

[11]*see, Videotape Project Criticized in Ky., The National Law Journal*, July 24, 1989; *Videotaped Trial Transcripts and Appellate Review: Are Some Courts Favoring Form Over Substance?, The Wayne Law Review*, Vol. 38, page 1639 (1992); *Electronic recording fails test, The Florida Bar Journal*, January, 1981, page 28; *Shillington v. K-MART Corp.*, 102 N.C. App. 187, 402 S.E.2d 155 (1991).

[12]*MICH. ADMIN. ORDER* 1987-7, 429 Mich. xciv (1987).

> District Court, where you are supposed to review an appellant's record on videotape.
>
> * * *
>
> *Because it's got to be the dumbest imaginable way to ask an appellate court to review a record*—and I am sorry—you want to go fast forward something. You got to fiddle with it, you know, you got to go back and forth. It takes forever. If you want to watch a three week trial, it takes you three weeks; whereas if you had a transcript, you can thumb through it, and you can review it.
>
> And I'm sorry, frankly, that we didn't ask you folks simply to get a transcript. Judge Greenberg and *I wrote such strong letters about how dumb this system was*, and I think it's being discontinued, and I think we thought it was discontinued. And this one sort of caught up on us where, all of a sudden, we found that we still had a videotape.

(Emphasis added).

Courts have used or experimented with videotape to create trial court records for at least twenty years, and many appellate judges and attorneys handling cases on appeal have expressed dissatisfaction with video taped records, (*see, "Fn" 11*). Furthermore, they complain that a "... real problem is being able to sufficiently concentrate on the audio, made all the more difficult by the slowness and pauses characteristic in the testimony"[13]. Yet experimentation with such video taping persists. Such experimentation with justice cannot be allowed.

In the case at hand the Respondents, (Appellees), eventually, after the oral argument, provided the panel with an unofficial copy of a written trial transcript[14]. On April 22, 1993, the panel released

---

[13]*Judicature* vol 59, no 5 Dec 1975 at 233.

[14]The exact date on which the panel received the unofficial copy of the trial in writing is not known by the Petitioner or his counsel.

an opinion rife with factual error and misunderstandings. A few examples of these problems highlight the difficulties of appellate decisions based on review of video-taped proceedings. In its opinion, (A-11), the Third Circuit panel notes that Wittekamp's counsel did not request a jury charge on a theory of liability that the District Court had refused to submit to the jury and on which it had granted judgment as a matter of law. Obviously, there is no duty to request jury charges on matters already taken away from the jury.

In its opinion the Court states:

> Wittekamp admitted that during the pre-sale 'due diligence' period in 1983, Gulf & Western had made available to him documents, other than Exhibit 98, which traced the collective bargaining history of the retiree medical insurance; that he elected not to read many of them; (A-13).

On the other hand, Wittekamp explicitly testified that he read every single document provided to him by Gulf & Western and not one of those documents vested retiree medical insurance.

In its opinion, the Court states:

> Wittekamp presented no evidence that the document contained in Exhibit 98 ever became a binding contract between USW and Gulf & Western, (A-5,6).

The facts are, two witnesses testified that Exhibit 98, the Health Benefits plan, was a binding contract. One witness, a union official, Mr. Poff, when asked "Was the contract in effect?" responded, "Absolutely." Another witness, Mr. Boyle a labor lawyer, testified "[t]he program of insurance is Exhibit 98. The Program of Hospital and Physician Service Benefits, Exhibit 98, is the program. That's the program". When these and other factual mistakes were brought to the attention of the Court of Appeals by a Petition for Rehearing the Court declined to correct itself. Undoubtedly, the Court did not again wish to delve into the morass of video tape.

Moreover, the panel in making its decision decided to discard the findings of the District Court Judge and made its own improper factual findings without properly reviewing the official transcript, which in this case was video tape pursuant to Third Circuit Rule 21(2).A.(i). By making the factual determination that Wittekamp had to investigate further, the panel has set such a high standard of due diligence in a fraud action that it has so far deviated from acceptable judicial proceedings to call in to question the soundness of its decision. The standard the panel has set would require all fraud to be discovered before a transaction takes place, therefore there will never be a valid action for fraud within the Third Circuit again. This rule of law is contrary to all the other circuits.

This case provides an especially effective vehicle for such review. It has a complicated factual setting that required careful factual review. The trial court did not comment upon the basis on which the appellate court ultimately rendered its decision—thus the Court of Appeals was conducting an improper de novo review of the matter without the benefit of the trial court's observation and without appropriate notice to counsel. Indeed the Court scarcely noticed the District Court's opinion from the bench or that Court's admonition to the jury that counsel's argument in his closing at the trial was incorrect and improper, (A-8). The Court of Appeals declined to reverse itself in spite its manifest factual error, and it did not remand the case to the District Court so that the factual issues could be decided by a jury.

II

THE THIRD CIRCUIT PANEL HAS DEPRIVED THE PETITIONER OF HIS FIFTH AMENDMENT RIGHTS TO COUNSEL AND VINDICATION AND HIS SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

a. The Third Circuit by engaging in de novo review and making impermissible findings of fact has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Every civil litigant in a Federal District Court has a right to trial by jury and to have the factual issues decided by a jury pursuant to the Seventh Amendment of the Constitution of the United States. The Petitioner, John N. Wittekamp was deprived of his Seventh Amendment right when the Third Circuit panel deviated from the accepted and usual coarse of judicial proceedings by engaging in de novo review and by making two impermissible findings of fact. The standard of review for the appeal was plenary as noted by the Third Circuit panel in its opinion, (A-8). Still the Third Circuit panel engaged in an improper de novo review by making two impermissible findings of fact that were not found in the District Court and were not the grounds for the District Court's ruling.

In its opinion, the Third Circuit panel cites *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 275 (3d Cir. 1991) as its authority to affirm the District Court's decision on other grounds, (A-12). The Third Circuit panel's reliance on *University of Maryland v. Peat Marwick Main & Co.*, is misplaced and is not based on sound legal reasoning. True, *University of Maryland v. Peat Marwick Main & Co.*, does stand for the proposition that an appellate court " ... can affirm a correct decision on a ground different than that relied on by the district court.". But *University of Maryland v. Peat Marwick Main & Co.*, does not stand for the proposition that an appellate court may make new factual determinations not addressed by the trial judge or jury in order to affirm a district court ruling on other grounds. *University of Maryland v. Peat Marwick Main & Co.*, only allows an appellate court to affirm a decision on other grounds when the theory of law is different and all material facts have already been determined[15]. Therefore, the Third Circuit panel abused the appellate process and has deprived the Petitioner of his right to trial by jury by making impermissible findings of fact and basing its decision on those facts not found in the District Court.

---

[15]In *University of Maryland v. Peat Marwick Main & Co.*, the appellate court ruled that the district court improperly applied the Burford abstention and then considered if Colorado River abstention applied even though the District Court did not consider the Colorado River abstention. The appellate court did not engage in any fact finding but merely applied the Colorado River abstention to the facts as pleaded in the Amended Complaint because it was a motion to dismiss and determined that the Colorado River abstention did not apply and reversed the trial court.

The two impermissible findings of fact are; 1) that Wittekamp retreated from his testimony that he asked at the 1983 closing in New York if there were vested benefits for retirees; and 2) that Wittekamp's investigation as to whether the retiree medical benefits were vested was not reasonable therefore he could not justifiably rely on the nondisclosure, i.e. that he lacked due diligence, (the non disclosure being the fact that the Defendants knew that the retiree medical benefits were vested at the time of the sale).

A United Stated Court of Appeals can not go on an impermissible fact finding mission where there are two permissible views the of evidence, *see, Amadeo v. Zant*, 486 US 214, 100 L. Ed. 2d 249, 108 S. Ct. 1771 (1988); *Icicle Seafoods, Inc., v. Worthington*, 475 US 709, 89 L. Ed. 739, 106 S. Ct. 1527 (1986). In both *Amadeo* and *Icicle Seafoods*, the finders of fact in the District Court proceedings were the Judges. On appeal in both cases, the Appellate Courts overturned the District Courts' rulings by making factual determinations contrary to those found in the District Courts. This Court in both cases correctly ruled that it is impermissible for an appellate court to make factual determinations were there are two permissible views of the evidence. In the case now before the Court the Third Circuit panel has perpetrated an even greater miscarriage of justice. The factual issues determined by the Third Circuit panel were not even presented to a jury for deliberation because the District Court took the entire claim away from the jury on other grounds, which the Court of Appeals did not address.

On July 24, 1993, the district court as a matter of law dismissed Wittekamp's vested retiree medical benefits claim on the grounds that Wittekamp had not established scienter. The District Court made this decision even though the Plaintiff presented; evidence that the Defendants knew that the retiree medical benefits were vested before the sale; evidence that the Defendants concealed the fact the retiree medical benefits were vested; evidence that the Defendants verbally told the Plaintiff before the sale that there were no vested benefits for retirees; and evidence that established the motive why the Defendants concealed the fact the medical benefits were vested. The jury never had the opportunity decide whether Wittekamp retreated from his testimony or whether Wittekamp's reliance was justified.

Wittekamp timely filed an appeal and the matter was argued in front of the Third Circuit Court of Appeals. The Third Circuit affirmed the District Court's decision but on two completely different grounds. The Third Circuit panel engaged in de novo review and made two impermissible findings of fact, not addressed by the jury, in rendering its decision.

In writing its opinion the Third Circuit panel ruled that:

> Based on a careful reading of his testimony we find that Wittekamp's retreat from his assertion that he had asked Gulf & Western's representatives whether the health benefits had vested was definite and complete. ... Given these circumstances, and the lack of other evidence showing an affirmative misrepresentation by Gulf & Western, the district court could not have permitted the jury to return a verdict for Wittekamp predicated on his claim of an oral misrepresentation in 1983, (A-10,11).

The testimony that the panel ruled that Wittekamp retreated from is the following:

WITTEKAMP – CROSS EXAMINATION

Q. What my questioning has been devoted to, whom did you ask as to **whether retiree benefits could be terminated?**

A. I asked that on the day of closing in New York office when we signed the document. I specifically asked that, sir.

Q. You specifically asked them what?

A. I specifically asked them **whether they were vested benefits for retirees.**

Q. Whom did you ask?

A. The people who signed the agreement.

Q. Who?

A. I think Mr. Hartline (phonetic) and Mr. Lewis. ....

Q. Did you say to a representative of Gulf & Western before you signed the contract **"Are retiree benefits vested"?**

A. Yes, sir. (emphasis added)

It is clear from this line of questioning that Mr. Wittekamp stated that he asked at the closing "whether there were any vested benefits for retirees" **which obviously included retiree medical benefits.** Some how the Third Circuit panel has decided the factual issue that Wittekamp retreated from this testimony because of the following testimony on recross examination:

WITTEKAMP – RECROSS EXAMINATION

Q. Mr. Wittekamp, do you recall testifying yesterday that, in 1983, you met with people in New York when you signed the contract? Do you remember that?

A. Yes sir.

Q. Do you remember telling the ladies and gentlemen of the jury that you specifically asked, **I think you said, Mr. Hertlein and Mr. Lewis whether retiree *medical* benefits were vested,** and you said you did discuss that issue with them, is that right[16]?

---

[16]It must be noted here that the Defendants paid for, and received a daily written transcript. The Defendants had in writing exactly what Wittekamp said the previous day. The Defendants knew that Wittekamp did not state that he specifically asked about retiree *medical* benefits. They knew he questioned them, (Gulf & Western), about all retiree benefits.

A. I told them that I—I basically asked them the question, all the liabilities reflected on Exhibit K, what is a part of the contract, and the answer was yes.

Q. Did you, Mr. Wittekamp, when you met with Mr. Hertlein and Mr. Lewis in New York in 1983 specifically ask them about retiree *medical* benefits?

A. I asked them the those liabilities were on exhibit K, sir.

Q. You asked them about *retiree* medical benefits, yes or no?

A. I can't answer that question, sir.
I asked them specifically what they had listed on Exhibit K. And they said yes. All the contracts, all the agreements, all the liabilities in excess of $5,000 are specifically listed on Exhibit K.

Q. Mr. Wittekamp, do you recall my asking you the following question at page 509 yesterday: "Question": Whom did you ask as to whether retiree benefits could be terminated?
Answer: I asked that on the day of the closing in New York office when we signed the document. I specifically asked that.
Question: You Specifically asked what?
Answer: I specifically asked whether they were vested benefits for retirees."
Now, is your recollection slightly different today, Mr. Wittekamp?

A. It is a question of playing with words, sir. I specifically asked to be listed all liabilities over $5,000 on Exhibit K. And they confirmed that all those liabilities were listed.

> Q. Mr. Wittekamp, did you **specifically raise with the Gulf & Western representatives in New York the question of retiree *medical* benefits?**
>
> A. I think I answered that question, sir.
>
> THE COURT: He did answer the question, Mr. Cardozo. You may proceed with another question. (emphasis added)

As it can clearly be detected by reviewing the above questioning, recross examination was extremely heated. The Defendants' on cross examination, asked Wittekamp if he asked at the 1983 closing **"Are retiree benefits vested"**?, to which Wittekamp truthfully responded, **Yes.** On recross examination however, the Defendants', in order to confuse the jury and Wittekamp, asked the carefully crafted question "did you *specifically* ask them about **retiree *medical* benefits,?".** As anyone can plainly see the question asked on recross examination is not the same question that was asked on cross examination. Wittekamp's answer to the question on recross examination can not be considered a retreat from the answer to the question asked during cross examination, in any way shape or form. Wittekamp realized that Cardozo was trying to twist his testimony on recross examination. That is why Wittekamp stated, "It is a question of playing with words, sir". The issue as to whether there was an oral misrepresentation should have definitely been decided by the jury.

Every question on recross examination included the carefully crafted words **"retiree *medical* benefits".** Wittekamp did not use the word medical when he asked about the retiree vested benefits but anyone would realize that the term **retiree benefits** includes medical benefits. Anyone can see, if they review the record, Wittekamp *never* retreated from his testimony that he asked at closing "whether they were vested benefits for retirees?". The Third Circuit panel has deprived the Petitioner of his rights to counsel, vindication and trial by jury by making the factual determination that Wittekamp retreated from his testimony. The Third Circuit panel had no authority or basis for making such a factual decision.

The Third circuit panel also made the impermissible factual determination that Wittekamp did not reasonably research whether retiree medical benefits were vested to justifiably rely on Gulf & Western's misrepresentations. The Third Circuit panel made this factual determination even though the issue of justifiable reliance, in Federal Courts, and in the courts of Pennsylvania is the province of the fact finder *see, National Bldg. Leasing, Inc., v. Byler,* 252 Pa.Super. 370, 381 A.2d 963, 966 (1977). The Third Circuit panel clearly should have remanded the case for a jury to determine the issue of justifiable reliance.

In its opinion the Third Circuit panel wrote:

> In this case, it is clear that Wittekamp should have recognized the need to inquire further as to whether the group health insurance had vested from reading the documents that were given to him. Accordingly, although we express no view as to what the result might be under a lesser standard, we are persuaded that Wittekamp failed to adduce sufficient evidence that would allow a jury to find under the clear and convincing standard that he justifiably relied on the nondisclosure, (A-15).

This ruling is a deprivation of Wittekamp's right to trial by jury and goes directly against the District Court's finding. The District Court Judge was correctly going to let the reasonable reliance issue go to the jury but determined that Wittekamp had not established scienter and took the vested retiree medical benefits fraud claim away from the jury. At the close of all of the evidence the District Court Judge stated:

> And then, so I think all of this is going to have to be presented to the jury for them to decide whether or not Mr. Wittekamp reasonably relied on what was set forth in Exhibit K, whether Exhibit K was sufficiently expansive and inclusive. Whether or not he should have gone the extra step, the extra mile to insure that this exhibit—this document was or was not in effect and so forth.

The Third Circuit panel has clearly deprived Wittekamp's of his right to trial by jury by making an impermissible finding of fact that goes directly against the finding of the District Court Judge and prevents a trial by jury. How can a Court of Appeals make the factual determination that the Appellant had a duty to investigate further when the appellant presented evidence during trial that; 1) he was familiar with labor agreements and that he read every document provided to him by Gulf & Western and concluded that the retiree medical benefits were not vested; 2) he negotiated the Bill of Sale which holds Gulf & Western liable for pre-sale, (i.e. vested), liabilities relating to any medical or dental insurance plan of the Division; 3) Four of the Defendants own lawyers could not find one document that vested medical benefits, (Cary Beane, Gulf & Western Inc.'s in house labor law expert at the time of the sale, the person that actually provided the labor agreements to Wittekamp in conjunction with purchase, stated under oath that if he were asked in 1983, (the year Wittekamp purchased Mackintosh-Hemphill), if the retiree medical were vested he would have responded, "No, not to my knowledge they are not"[17], Lisa Revlin, in house counsel for Gulf & Western Manufacturing in an affidavit dated August 6th, 1987, when referring to retiree medical benefits stated that "No explicit language in any collective bargaining agreement or other related document *ever* imposed upon G&W Manufacturing any irrevocable obligation to maintain such a plan in effect indefinitely", (emphasis added), both of the Defendants' trial attorneys, Michael Cardozo, Esquire and Marc Goldstein, Esquire, told Wittekamp during a 1987 meeting that the retiree medical benefits were not vested); 4) the Defendants had in their possession Exhibit 98 a document that clearly vested the retiree medical benefits and did not provide it to Wittekamp before the purchase; 5) Wittekamp asserted during trial that he asked at closing if there were any vested benefits for retirees and was told there were none; 6) the Defendants' had a document, Exhibit 621, a document prepared by Gulf & Western and produced from Gulf & Western's files, which clearly states **"Buyer will assume the union contract, including retiree medical of approximately $11,100,000.00"** and withheld that document from Wittekamp; 7)

---

[17]Mr. Beane testified that he never saw Exhibit 98 before the trial of the case but upon reviewing Exhibit 98 he testified that the language of Exhibit 98 would indicate that the retiree medical benefits were vested.

the Defendants own witness and one time labor attorney Mr. Beane testified that Gulf & Western was liable for all labor agreements, pension plans and insurance plans that vested prior to the date of sale, October 17, 1983, (*see, Fn 1); and 8*) Defendants' own attorney Marc Goldstein stated during that the trial that the retiree medical benefits vested prior to October 17, 1983, (*see, Fn 1*).

The panel has decided the factual issue that Wittekamp needed to investigate further and does not even state that the further investigation would be fruitful. The fact of the matter is that the Defendants knew that the benefits were vested but continued to lie, misrepresent and conceal that fact. There is not one case that has required a person to investigate a purchase so thoroughly that he would have to discover the fraud before the purchase takes place when the Defendants actively conceal the fraud.

The Third Circuit panel's improper de novo review of the record misquotes testimony and ignores the evidence. ***How can the Third Circuit panel rule that Wittekamp could not rely on the Bill of Sale.*** A document which clears Wittekamp's company of any liability involving vested medical benefits for retirees. There is no doubt that the reliance issue is factual and is a decision for a jury to make. The Third Circuit panel had no authority to make that factual decision.

B. The Third Circuit Court of Appeals has sanctioned a district court jury charge that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

During the jury charge, the District Court Judge made two clear mistakes which deprived Wittekamp of his Fifth Amendment due process rights to counsel and vindication and his Seventh Amendment right to trial by jury[18]. The Third Circuit Court of Appeals failed to correct the District Court Judge's mistakes, (A-8). Therefore, the Third Circuit panel has so far departed from the

---

[18]*see, Powell v. State of Alabama*, 287 US 45, 53 S.Ct. 55, 64 (1932); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980), *U.S. Cert. denied*, 449 US 820; *Barrett v. United States*, 798 F.2d 565, 575 (2nd Cir. 1986).

accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

During the trial the District Court Judge informed counsel for both parties that he had a pressing matter in another case that he had to address. A criminal case which he presided over resulted in a hung jury requiring him to retry the criminal case before Wittekamp's case was scheduled for completion. The Judge informed counsel that either the case would have to be streamlined or the case would be put on hold for about two months. Wittekamp, not wanting to have his case prejudiced by a two month delay in the middle of the trial, by and through his attorney Louis M. Tarasi, Jr., Esquire, informed the court that he would agree to streamline his case by not calling some cumulative witnesses.

During closing arguments, counsel for Defendants made a negative inference by bringing up the fact that Wittekamp did not call to the stand some of his witnesses. The witnesses not called to the stand were cumulative in nature, **equally accessible to both parties** and were the same witnesses that Wittekamp's attorney did not call in deference to the Judge's request to streamline the case. Wittekamp's attorney in order to vindicate his client's cause told the jury during closing that the witnesses referred to during the Defense counsel's closing were not called in deference to the Judge's request that the case be streamlined. The judge during his jury charge told the jury that Wittekamp's attorney was "incorrect", that "[T]here was no deadline imposed by the Judge in this case in any way, shape or form that required either party to streamline their case as to leave out any witnesses ...". The Judge made this jury charge even though near the beginning of the trial the Judge stated to counsel:

> There is an unanticipated conflict that has arisen that I have to bring to your attention and it is that a criminal case that resulted in a hung jury and has to be retried within a certain time period is, unfortunately, I thought that there might be some motions pending which would obviate the need to interrupt this proceeding, but the way I see it, we are either going to have to finish this case by Wednesday, July 22, or we will have to recess the trial by that time, if you are not

> finished, and we won't be able to reconvene, in all likelihood, until the second week in September ...
>
> **So, to the extent that you can streamline the matters without removing any matters of importance, I would encourage you to do so,** (emphasis added).

To this request to streamline the case, Wittekamp's attorney stated "Judge, I can telescope some sections of my case by having one person instead of six or something like that". To this the Judge responded "Well, any time you can do that, of course, that is preferred and that's ideal". The Judge's jury charge that Wittekamp's attorney was incorrect, given the facts, was highly prejudicial, a complete miscarriage of justice and a depravation of Wittekamp's rights to counsel, vindication and trial by jury. Wittekamp's right to counsel was destroyed by the Judge improperly calling Wittekamp's lawyer a liar. Wittekamp's right to vindication was destroyed by the Judge not allowing Wittekamp's attorney state the truth as to why some witnesses were not called to the stand. Wittekamp's right to trial by jury was destroyed by the Judge forcing the jury to believe the Defendants' version of why some witnesses were not called by charging that Wittekamp's lawyer was incorrect, thereby directing a verdict on this issue in favor of the Defendants.

Given the fact that Wittekamp's attorney did not call the witnesses in deference to the Judges request to streamline the case and the given the fact a party can not draw negative inferences during a closing argument when cumulative witnesses, equally accessible to both parties are not call to testify[19]. The District Court Judge severely prejudiced Wittekamp's case by charging the jury that Wittekamp's counsel was incorrect for bringing to light the fact that the Court wanted the case streamlined and that is why some witnesses were not called. Thus, the District Court Judge deprived Wittekamp of his constitutional rights.

---

[19]*Bentivoglio v. Ralston*, 399 Pa. 419, 288 A.2d 745, 748; and *Conner v. Cresent Lighting Corp.*, 61 F.R.D. 62, 66 (E.D. Pa. 1973).

During the jury charge. The District Court Judge also charged that it was improper for Wittekamp's attorney, during his closing, to address the fact that both of the trial attorneys for the Defendants, Cardozo and Goldstein, had personal knowledge of material facts critical to the lawsuit and neither testified. Wittekamp testified during trial that both Cardozo and Goldstein told him during a 1987 meeting that the retiree medical benefits were not vested. Clearly it was within Wittekamp's right to draw to the jury's attention the fact that neither of these two attorneys took the stand to contradict the fact the they told Wittekamp the retiree medical benefits were not vested[20]. The District Court Judge deprived Wittekamp of his right to vindication and destroyed his right to counsel by stating that Wittekamp's attorney's statement in regard Goldstein's and Cardozo's failure to testify was improper. The Trial Judge told the jury Wittekamp's attorney's statements were both incorrect and improper. Therefore, his jury charge completely stripped Wittekamp's attorney of any credibility and in effect stripped Wittekamp of his right to counsel and a fair trial by jury.

III

THE COURT OF APPEALS FOR THE THIRD CIRCUIT'S USE OF AN UNOFFICIAL WRITTEN TRIAL TRANSCRIPT, PROVIDED BY APPELLEE, AFTER THE ORAL ARGUMENT TOOK PLACE, IN ORDER TO REVIEW THE RECORD BELOW VIOLATED THE FEDERAL RULES OF APPELLATE PROCEDURE AND THE PETITIONER'S DUE PROCESS RIGHTS.

The official record of this case was video-tape pursuant to Third Circuit Court of Appeals Rule 21(2).A.(i), (A-40). Therefore, pursuant to 28 U.S.C.S. §2720 and Federal Rules of Appellate Procedure 10 and 11 the only record that the Appellate Court could review was the video-tape. Michael Cardozo, Esquire, counsel for the

---

[20]Since neither Cardozo or Goldstein denied that they told Wittekamp the retiree medical benefits were not vested they both acquiescence to Wittekamp's testimony *see, Weigand v. American Stores Company*, 346 Pa. 253, 29 A.2d 484, 486 (1943); and *Wigmore on Evidence 3rd. Ed.*, §1071.

Respondents, (Appellees), during the oral argument of the appeal offered to supply the panel with a copy of a written trial transcript and the panel accepted this offer. The panel also allowed appellees, (Gulf & Western), to annotate their brief and the oral argument by citing the written transcript were they referred to testimony.

The transcript was supplied by the Gulf & Western to the Third Circuit panel after the oral argument. Wittekamp also received the written transcript from Gulf & Western about one week after the oral argument. At the time Wittekamp had no other alternative then to obey the panel's request to annotate the oral argument.

The Third Circuit panel used the written transcript to make it's decision as evidenced by the following; "Based on a careful *reading* of this testimony ..." (A-10),(emphasis added). The Third Circuit was not allowed to use the transcript provided by the Gulf & Western because it was not a part of the official record and Wittekamp was not allowed to review the unofficial transcript before it was submitted to the Third Circuit panel by Gulf & Western. This clearly violated Wittekamp's due process rights. Therefore this case should be remanded for, at the very least, a constitutionally fair trial.

CONCLUSION

This case cries out for justice. This kind of case holds the Federal Courts and the entire Federal system up to scorn, ridicule, and disrespect. Mr. Wittekamp is an intelligent business man. Both he and his lawyers and numerous business associates know what happened at the trial and on appeal. The District Court Judge improperly took one claim away from the jury and then prejudiced the only remaining claim by destroying the credibility of Wittekamp's attorney during the jury charge. The Third Circuit panel made impermissible findings of fact and engaged in an improper de novo review that was fast and loose and which ignored and mischaracterized the exhibits and the evidence. This gross miscarriage of justice should not stand. Mr. Wittekamp is entitled his day in Court based on the facts. Mr. Wittekamp should not be denied this right.

Respectfully submitted,

LOUIS M. TARASI, JR., ESQUIRE
TARASI & JOHNSON, P.C.
510 THIRD AVENUE
PITTSBURGH, PA 15219
(412)391-7135
Attorneys for Petitioner

APPENDIX

APPENDIX INDEX

	Page
Third Circuit Opinion, filed April 22, 1993, affirming the District Court ruling granting judgment as a matter of law on the vested retiree medical benefits fraud claim but on different grounds	A-1
Third Circuit Judgment, filed April 22, 1993, affirming the District Court ruling	A-16
Western District of Pennsylvania Jury Verdict and Judgment and Judgment as a matter of law in favor of the Defendant, filed July 24, 1992	A-18
Western District of Pennsylvania bench ruling granting the Defendants' motion for judgment as a matter of law at the close of all evidence in regards to the vested retiree medical benefits fraud claim, July 22 and 23, 1992, (this bench ruling was video taped and reduced to writing)	A-19
Western District of Pennsylvania bench ruling denying the Defendants' motion for judgment as a matter of law at the close of Plaintiff's case in chief in regards to the vested retiree medical benefits fraud claim, July 15, 1992, (this bench ruling was video taped and reduced to writing)	A-27
Western District of Pennsylvania Order, filed April 1, 1992, denying both the Plaintiff's and the Defendants' motions for summary judgment	A-28
Western District of Pennsylvania Memorandum Opinion filed April 1, 1992, denying both the plaintiff's and the Defendants' motions for summary judgment	A-30
Third Circuit denial of Appellant's Petition for Rehearing, dated May 24, 1993	A-34
Third Circuit Rule 21	A-36
Federal Rules of Appellate Procedure Rule 11(b)	A-44

Filed April 22, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3428

JOHN N. WITTEKAMP

v.

GULF & WESTERN, INC.;
GULF & WESTERN INDUSTRIES, INC.;
GULF & WESTERN MANUFACTURING CO.;
John N. Wittekamp
Appellant

On Appeal From the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 89-471)

Argued March 2, 1993

PRESENT: BECKER and GREENBERG, *Circuit Judges*,
and ROBINSON, *District Judge**

(Filed April 22, 1993)

Louis M. Tarasi, Jr. (Argued)
Joseph J. Hinchliffe
Tarasi & Johnson
510 Third Avenue
Pittsburgh, PA 15219
Attorneys for Appellant

* Honorable Sue L. Robinson, United States District Judge for the District of Delaware, sitting by designation.

Michael A. Cardozo (Argued)
Marc J. Goldstein
Adrienne B. Koch
Proskauer Rose Goetz &
Mendelsohn
1585 Broadway
New York, NY 10036

H. Woodruff Turner
Scott S. Small
Kirkpatrick & Lockhart
1500 Oliver Building
Pittsburgh, PA 15222
Attorneys for Appellees

OPINION OF THE COURT

GREENBERG, *Circuit Judge*

I. *BACKGROUND*

Appellant John N. Wittekamp brought this suit in state court to recover damages for alleged misrepresentations by appellees Gulf & Western, Inc., Gulf & Western Industries, Inc., Gulf & Western Manufacturing Co.; and Wickes Manufacturing (collectively referred to as Gulf & Western), arising from his employment by and subsequent purchase of one of Gulf & Westerns corporate divisions. Gulf & Western timely removed the matter to the district court on the basis of diversity of citizenship. Wittekamp now appeals from a judgment of July 24, 1992, in favor of Gulf & Western entered in part on its motion for a judgement and in part on a jury verdict. We will affirm.[1]

1. We have jurisdiction pursuant to 28 U.S.C. § 1291. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Wittekamp is a citizen of Pennsylvania. Gulf & Western Industries, Inc., Is a Delaware corporation with its principal place of business in New York. Wickes Manufacturing, Gulf & Western, Inc., and Gulf & Western Manufacturing Co. are all Delaware corporations having their principal places of business in Michigan.

The relevant facts as developed at trial are as follows. In 1982, Wittekamp relinquished his position as Chief Executive Officer and Chairman of the Board of a fire truck manufacturing company in western New York to become President of the Macintosh-Hemphill division of Gulf & Western (Mac-Hemp). Subsequently, in April 1983, representatives of Gulf & Western contacted him about purchasing Mac-Hemp. Wittekamp and Edward B. Hirschberg, one of Gulf & Western's Vice-Presidents, then began negotiations for this purchase. On October 17, 1983, Wittekamp acquired Mac-Hemp in a leveraged buyout through his solely owned corporation that he formed for the transaction. Under the purchase agreement, Wittekamp assumed certain obligations of Gulf & Western including the then-current collective bargaining agreements with the United Steelworkers of America (USW), which required Mac-Hemp to provide group health insurance for retired employees. At the closing, a Memorandum of Understanding between Wittekamp and the USW confirmed this transfer of the obligation for the group health insurance.

From 1984 to 1987, following Wittekamp's purchase of Mac-Hemp, its financial position grew progressively worse. In early 1987, to stem his losses, Wittekamp gave notice to the retired employees that their group health insurance was being terminated. On March 22, 1987, the retirees commenced a putative class action in the United States District Court for the Western District of Pennsylvania against Mac-Hemp and Gulf & Western seeking restoration of their group health insurance, or damages for its wrongful cancellation in violation of the collective bargaining agreement (*Wernert* case). Gulf & Western partially settled the Wernert case by agreeing to share the cost of group insurance with employees who retired before the sale of Mac-Hemp to Wittekamp. Mac-Hemp subsequently filed for bankruptcy in July 1987, and thus the Wernert case was stayed as to it. Insofar as we are aware, no court has determined whether Mac-Hemp could terminate the benefits.[2]

---

2. For purposes of the instant litigation, the district court assumed the retiree medical benefits had vested, based on a concession to that effect by Gulf & Western.

Wittekamp, who perceived that he had been injured by misrepresentations made by Gulf & Western, then commenced this action in the Court of Common Pleas of Allegheny County, Pennsylvania. On March 8,1989, Gulf & Western removed the case to the United States District Court for the Western District of Pennsylvania

In his complaint, Wittekamp alleged that Gulf & Western failed to disclose Mac-Hemp s precarious financial condition before hiring him. He further contended that he acquired Mac-Hemp in the belief that he could cancel the group health insurance for retired steelworkers when the USW collective bargaining agreement expired, that Gulf & Western knowingly failed to tell him at the time of the purchase that such benefits were not cancelable because they had already had vested, and that but for his inability to terminate these benefits without controversy, he would not have suffered the consequences of Mac-Hemp's 1987 business failure and bankruptcy.[3] Accordingly, his complaint asserted two distinct causes of actions for fraud,[4] one based upon Gulf & Western's fraudulently inducing him to leave his previous position to join Mac-Hemp and one based on Gulf & Western's persuading him to buy Mac-Hemp once he became its president.[5]

---

3. The complaint also Included a claim for breach of contract relating to a July 5, 1983 letter of intent preceding the sale, but Wittekamp withdrew this claim on the first day of trial.

4. Wittekamp's fraud theory evidently rests on his reading of case law concerning an employer's right to terminate collectively-bargained retirement benefits. Some cases have held that if the collective bargaining agreement did not clearly reflect the parties' intentions concerning duration of benefits, evidence of past conduct in performing the collective bargaining agreement could indicate that management understood the benefits to outlast the agreement's term. *See, e.g., Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). In view of our conclusion that Wittekamp did not adduce sufficient evidence to withstand the motion for judgment, we do not need to address this point.

5. Following discovery, both parties moved for summary judgment but the district court denied the motions on the ground that there were disputed questions of material fact as to whether Gulf & Western knew that the health Insurance benefits had vested and whether Wittekamp was operating on the false assumption that they had not. *See Wittekamp v. Gulf & western, Inc.*, 788 F. Supp. 246 (W.D. Pa. 1992).

At trial, Wittekamp focused his theory of fraud on several documents. The first was Paragraph 6M and Exhibit K of the October 17, 1983 Purchase Agreement, which purported to provide a "true and complete list" of all the contractual obligations exceeding $5,000 which Wittekamp would have to assume upon his purchase of Mac-Hemp. Wittekamp argued that this list misled him because it did not mention the group health plan for the retirees—an omission which, he claimed, led him to believe that these benefits had not vested and were terminable. Gulf & Western responded that Exhibit K listed the group health plan under Items 4(A) and 4(b). Gulf & Western also contended that inasmuch as Exhibit K was only a list, the omission of an indication of whether the retirees' group health benefits were vested was not material to its purpose.

Wittekamp also introduced Exhibit 98, a booklet entitled "Program of Hospital and Physicians Services Benefits for Eligible Pensioners and Surviving Spouses Not Eligible for Medicare." The booklet, which bore an "effective date" of November 1, 1975, was annexed to a December 2, 1975 letter from Mac-Hemp's Supervisor of Personnel Administration to a USW insurance department employee. It described health insurance benefits covering persons who had not reached the age of Medicare eligibility. More importantly, Exhibit 98 included a two-page unsigned document entitled `Pensioners and Surviving Spouses Health Insurance Agreement," which stated that the insurance coverage would not terminate for individuals who retired while the agreement was in effect and who were not yet eligible for Medicare. Wittekamp pointed to Exhibit 98 as evidence that retiree group health insurance at Mac-Hemp already had vested when he purchased Mac-Hemp in October 1983 and that Gulf & Western knew this. Because Gulf & Western had not shown the document to Wittekamp prior to the discovery in this action, he contended that in 1983 Gulf & Western deliberately had hidden it from him to prevent him from learning that the benefits had vested.

Five Gulf & Western officers and attorneys who took part in the Mac-Hemp sale testified that they never saw Exhibit 98 prior to the 1983 sale, or even after that, until it was located in Gulf & Western's files during discovery in this action. They also testified that the USW and Mac-Hemp never executed the agreement within

Exhibit 98. Indeed, Wittekamp presented no evidence that the document contained in Exhibit 98 ever became a binding contract between the USW and Gulf & Western.

Wittekamp produced Exhibit 621 as his third item of documentary evidence. This exhibit was an internal Gulf & Western accounting report prepared before the sale containing the statement that "[b]uyer will assume the union contract, including retiree medical of approximately $11,100,[000]." Wittekamp argued that this $11.1 million figure indicated that the retiree group health insurance was not cancelable, because $11.1 million far exceeded the $300,000 annual insurance premium cost, and that Gulf & Western deliberately did not disclose this document to him before the purchase. Rudolph Hertlein, a vice-president of Gulf & Western, denied that the $11.1 million figure reflected a belief by Gulf & Western that the benefits had vested. Rather, he claimed that the figure represented only a hypothetical calculation for an unlikely scenario in which Mac-Hemp would cease to operate and all the workers would retire simultaneously.

In addition to offering these documents relating to alleged nondisclosures by Gulf & Western, Wittekamp testified on cross-examination that he asked Hertlein and Charles Lewis, a Gulf & Western attorney, just before the completion of the sale, whether retiree group insurance had "vested" and they said no. On appeal, Gulf & Western contends that this testimony did not create an issue of fact for the jury because upon further cross-examination Wittekamp retracted this statement.

Finally, Wittekamp presented his own testimony and that of two of his former attorneys about 1987 discussions between Wittekamp and Gulf & Western's trial attorney concerning the merits of the retirees' claims in the *Wernert* case. Wittekamp and his former attorneys testified that Gulf & Western's attorneys told them in 1987 that they knew of no documents that specifically provided that retiree benefits were vested. At trial, Wittekamp sought to use this testimony to advance a claim of fraud occurring in 1987; namely, that Gulf & Western sought to prevent him from discovering that it had not told him in 1983 that the benefits had vested.

Gulf & Western moved, both after Wittekamp rested and at the close of all the evidence, for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(a).[6] The district court denied the motion as to Wittekamp's claim concerning the fraudulent inducement by Gulf & Western to hire him at Mac-Hemp. The court, however, did grant the motion with respect to the other claims.

In regard to the fraud claim for the sale of the company in 1983, the district court stated that the crucial issue was not whether the benefits had vested—Gulf & Western conceded at trial that they probably had vested by 1983—but whether there was evidence that Gulf & Western knew that they had vested and hid that fact from Wittekamp at the time of the purchase. The district court held that the mere fact that Exhibit 98 was found in Gulf & Western's files did not mean that the Gulf & Western representatives negotiating with Wittekamp knew of its existence and sought to conceal it. The district court noted that Wittekamp presented no evidence showing any such knowledge or intent. The district court also stated that neither Exhibit K nor, in light of Hertlein's uncontradicted testimony, Exhibit 621 showed that Gulf & Western intended to deceive Wittekamp. Thus, in the court's view, he had failed to establish scienter. The district court did not comment on Wittekamp's testimony regarding an oral misrepresentation at the 1983 closing, but given its ruling that there was no evidence that Gulf & Western intentionally or recklessly misrepresented to him that the benefits had not vested, the court apparently did not believe that this testimony created a question for the jury.

The district court also granted judgment for Gulf & Western on any claims based on the 1987 conversations between Wittekamp and Gulf & Western's attorneys because there was insufficient evidence that prior to the settlement of the *Wernert* case anyone at Gulf & Western knew that the benefits had vested. The court noted further that neither the complaint nor the pretrial documents contained a claim that Gulf & Western was guilty of fraud beyond 1983, and thus the claim was not articulated properly under Fed. R.

---

6. The parties' briefs have referred to the motion as seeking a directed verdict, but the motion more appropriately is termed a motion for judgment as a matter of law because the 1991 revision to Rule 50(a) abandoned the term "directed verdict."

Civ. P. 9(b). On the remaining fraud claim, the jury found that Gulf & Western had not committed any fraud in connection with Wittekamp's acceptance of employment in 1982.

On appeal, Wittekamp challenges the district court's grant of the motion for judgment as to the 1983 and 1987 fraud claims, the court's instructions to the jury, its dismissal of his punitive damages claim, and its exclusion of extrinsic evidence he offered to aid in the interpretation of the collective bargaining agreements between Mac-Hemp and USW. After reviewing each of these claims, we find them all to be without merit and that the only claim requiring further discussion is Wittekamp's challenge to the district court's grant of judgment as a matter of law to Gulf & Western.

II. *STANDARD OF REVIEW*

We exercise plenary review of the grant of a motion for judgment as a matter of law and apply the same standard as the district court. *Sowell v. Butcher & Singer, Inc.* 926 F.2d 289, 296 (3d Cir. 1991); *Frank Arnold Contractors, Inc. v. Vilsmeier Auction Co.*, 806 F.2d 462, 463 (3d Cir. 1986).[7] Thus, we may sustain the order granting judgment to Gulf & Western only if, viewing the evidence in the light most favorable to Wittekamp and giving him the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability. *Billet v. Cigna Corp.*, 940 F.2d 812, 815 (3d Cir. 1991). Under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-54, 106 S.Ct. 2505, 2512-13 (1986), we also consider that Wittekamp must satisfy a heightened standard of proof—here the clear and convincing standard—in order to support a jury verdict in his favor.

III. *DISCUSSION*

To establish a claim of fraudulent misrepresentation under Pennsylvania law, which all the parties agree governs, Wittekamp was required to prove by clear and convincing evidence: (1) a false representation of an existing fact or a nonprivileged failure to dis-

7. Our case law regarding the standard of review on appeals from orders granting directed verdicts is applicable to an order granting a judgment as a matter of law.

close; (2) materiality, unless the misrepresentation is intentional or involves a nonprivileged failure to disclose; (3) scienter, which may be either actual knowledge or reckless indifference to the truth; (4) justifiable reliance on the misrepresentation, so that the exercise of common prudence or. diligence could not have ascertained the truth; and (5) damage to him as a proximate result. *See Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 731 (3d Cir. 1991); *Berda v. CBS, Inc.*, 881 F.2d 20,27 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062, 110 S.Ct. 879 (1990); *Beardshall v. Minuteman Press Int'l, Inc.*, 664 F.2d 23, 26 (3d Cir. 1981); *Shane v. Hoffman*, 324 A.2d 532, 536 (Pa. Super. Ct. 1974); *Scaife Co. v. Rockwell-Standard Corp.*, 285 A.2d 451, 454 (Pa. 1971), *cert denied*, 407 U.S. 920, 92 S.Ct. 2459 (1972). Thus, in considering a defendant's motion for judgment as a matter of law "where fraud is the basis of the [plaintiff's] claim, the initial inquiry for the judge is whether the proof of every element of fraud has met the exacting [clear and convincing] standard, justifying a refusal to grant" the motion and the submission of the case to the jury. *Delahanty v. First Pennsylvania Bank, N.A.*, 464 A.2d 1243, 1253 (Pa. Super. Ct. 1983).

a. *Oral Misrepresentations*

Wittekamp first argues that the jury should have been permitted to consider testimony that, just before the completion of the sale, he specifically asked Hertlein and Lewis whether retiree group health Insurance was a vested benefit. However, our review of the trial record leads us to conclude that Wittekamp retracted his testimony on this point and that the jury could thus not have predicated a verdict in his favor on this evidence.

During Wittekamp's direct examination, his attorney asked if prior to the purchase of Mac-Hemp he had thought that the health benefits had vested. Wittekamp replied in the negative, explaining that he had come to this conclusion by reviewing the documents listed in Exhibit K. But notably, during this testimony, Wittekamp did not mention that anybody from Gulf & Western had told him that the health benefits had not vested. However, during his cross-examination, Wittekamp stated that while he never brought up the specific issue of the vested benefits during his negotiations, he had

asked Hertlein and Lewis about it at the time of the closing. Although this portion of Wittekamp's testimony is somewhat convoluted, we are satisfied that he claimed to have concluded that the benefits had not vested from his reading of the Exhibit K documents *and* from the representations made by Hertlein and Lewis during the closing.

Yet, Wittekamp's position changed during recrossexamination. When Gulf & Western's attorney asked him if he specifically raised with Hertlein and Leis the question of whether the benefits had vested, Wittekamp replied that he asked whether all the liabilities were reflected in Exhibit K. When the attorney questioned Wittekamp once more "you asked them about retiree medical benefits, yes or no?" Wittekamp answered "I cannot answer that question sir." Wittekamp then went on to explain:

> I asked them specifically [whether] they had listed all the liabilities on Exhibit K. And they said yes. All the contracts, all the agreements, and all the liabilities in excess of $5,000 are specifically listed on Exhibit K.
>
> ...
>
> It is a question of playing with words sir. I specifically asked to be [sic] listing all liabilities over $5,000 on Exhibit K. And they confirmed that all those liabilities were listed.

Immediately thereafter, the attorney again asked Wittekamp if he specifically raised the issue of the health benefits being vested with representatives of Gulf & Western, to which Wittekamp responded "I think I answered that question, sir." This answer appears to refer to his previous response "I cannot answer that question, sir."

Based on a careful reading of this testimony we find that Wittekamp's retreat from his assertion that he had asked Gulf & Western's representatives whether the health benefits had vested was definite and complete. A close examination of the testimony reveals that Wittekamp fell back to his prior position on direct examination, that his request to Gulf & Western for a written repre-

sentation (in paragraph 6M of the purchase agreement) as to the completeness of the list of contracts (Ex. K) was, in his judgment, the equivalent of having asked for and received a specific representation that there were no vested benefits. We also find it significant that Harry Messina, the attorney who represented Wittekamp during the negotiations and who was present at the closing, and all the Gulf & Western witnesses involved in the sale, testified that Wittekamp never asked a question about whether retiree group health Insurance was vested during the three-day closing. Further, Wittekamp's trial attorney seemed implicitly to have disclaimed Wittekamp's "specific representation" testimony by asserting that it was merely another version of Wittekamp's claim that Exhibit K was misleading. Given these circumstances, and the lack of other evidence showing an affirmative misrepresentation by Gulf & Western, the district court could not have permitted the jury to return a verdict for Wittekamp predicated on his claim of an oral misrepresentation in 1983.[8]

Furthermore, the district court correctly dismissed the 1987 claim of misrepresentation because Wittekamp made no claim of fraud occurring alter 1983 in his complaint or his pretrial narrative statements. Therefore, we need not consider its alternative holding that Wittekamp did not adduce sufficient evidence showing that Gulf & Western acted with scienter in regard to the 1987 claim.

b. *Nondisclosures*

Wittekamp also argues that he introduced sufficient evidence to support a jury finding that prior to the 1983 sale Gulf & Western fraudulently concealed that Mac-Hemp's retiree health insurance was vested. More specifically, he points to Exhibit 98—the 1978 health benefits description which suggested the benefits were vested but of which Gulf & Western disclaimed knowledge—and Exhibit 621—the accounting statement which included an assumption that the retiree health benefits would cost $11.1 million, meaning they could not be canceled. Wittekamp contends that Inasmuch as Gulf

---

8.In this regard, we also note that Wittekamp's trial attorney did not ask the district court to submit to the jury the specific question of whether any oral representation had been made at the 1983 closing.

& Western arguably knew of these documents and did not tell him about them, a genuine issue of material fact exists as to scienter.

However, we need not consider this contention. Even if we held that the district court erred in finding that Wittekamp had not introduced sufficient evidence of scienter to allow the deliberate nondisclosure claim to go to the jury, we would not change our result as we are convinced that Wittekamp has failed to adduce clear and convincing evidence of his reasonable reliance on the alleged nondisclosure to preclude granting the motion for judgment. "We can affirm a correct decision on a ground different than that relied on by the district court." *University of Maryland v. Peat Marwick Main & Co.*,923 F.2d 265, 275 (3d Cir. 1991). Therefore, although it was not a basis for the district court's decision, we will affirm the district court's order granting judgment to Gulf & Western on the nondisclosure claim on the basis of Wittekamp's failure to demonstrate justifiable reliance.

We reach this conclusion for several reasons. In the first place, contrary to Wittekamp's claim that Exhibit K to the purchase agreement did not list the insurance obligation to the retirees among Mac-Hemp's long-term contractual obligations, Exhibit K listed Mac-Hemp's retiree group health insurance program under items 4(a) and 4(b). This disclosure should have raised a question in his mind as to whether he could cancel this obligation. Furthermore, a reading of the language of the group health plan should have alerted Wittekamp to the fact that he required more information on the vesting issue. For example, paragraph 9.24 of the group insurance program for hourly paid employees provides:

> A person who becomes eligible to receive a surviving spouse's benefit under the company's pension plan applicable to you is also eligible for the hospital and medical coverage described in paragraphs 9.22 and 9.23

Although certainly not the only reasonable reading of this passage, one interpretation of it that should have to occurred to Wittekamp was that promising retired people that they will have continuing insurance alter their spouses' death means that the

insurance will last for the lifetime of the spouses, a possible indication that the insurance could not be canceled.

Even more importantly, Wittekamp admitted that during the pre-sale "due diligence" period in 1983, Gulf & Western had made available to him documents, other than Exhibit 98, which traced the collective bargaining history of the retiree group health insurance; that he elected not to read many of them; and that he did not even ask an attorney to review any of them. Yet, these documents included the group insurance programs for 1981 and 1979, and the USW collective bargaining settlement agreements that initiated the retiree group health insurance program in 1974, and modified it in 1978, and again in 1981. An examination of these documents should have caused Wittekamp concern on the vesting issue. The 1974 Mac-Hemp/USW settlement agreement provided that only retirees not eligible for medicare would be eligible for group insurance and that coverage would "terminate when such person first becomes eligible for medicare." On the other hand, the 1978 Mac-Hemp/USW settlement agreement, resolving a 1977-78 strike, removed the previous Medicare-age duration limitation, a deletion reflected in subsequent agreements as well. The fact that the initial collective bargaining agreement dealing with group health insurance established a single duration limitation—Medicare age—and subsequent agreements removed that duration limitation and added no other, should have suggested to Wittekamp the possibility that by 1983 there was no duration limitation and the benefits were not cancelable. Thus, while arguably a review of these documents would not necessarily have confirmed that the benefits had vested, it at least should have raised sufficient questions in Wittekamp's mind as to warrant his further inquiry of Gulf & Western. Certainly an experienced labor lawyer would have recognized these questions. Yet, despite the extensive labor relations aspects of the transaction, Wittekamp elected to proceed without advice from any labor attorney in his multi-million dollar purchase.

We note further that as the President of Mac-Hemp and the former CEO of another company, and as a person having long business experience, Wittekamp was clearly a sophisticated party. *Emery v. Third Nat'l Bank of Pittsburgh*, 171 A. 881, 882 (Pa. 1934) (declaring that whether reliance on a misrepresentation is justified is depen-

dent in part upon such factors as the respective intelligence and experience of the parties); *B.O. v. C.O.*, 590 A.2d 313, 316 (Pa. Super. Ct. 1991) (considering subjective characteristics in fraud action to determine whether reliance on misrepresentations was reasonable). As such, he should have recognized that an employer's obligation to provide health benefits may be costly and difficult to terminate. In light of his sophistication, as well as the absence of any special fiduciary or longstanding business relationship with Gulf & Western, giving him a basis for relying on representations made by Gulf & Western, *Scaife*, 285 A.2d at 455; the questions that reading the past collective bargaining agreements and group health insurance documents should have raised in his mind; and the considerable amount of money involved, Wittekamp was wholly unjustified in assuming that the benefits had not vested simply because Gulf & Western did not indicate that they had vested. This is particularly so because a determination that a benefit is or is not vested necessarily implicates an abstract legal concept on which reasonable people can disagree. *See Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). Thus, a claim derived from a determination that benefits are vested, differs in character from more tangible representations, *i.e.*, the amount of accounts receivable or payable or whether a seller owns certain property.

Wittekamp seeks to avoid our conclusion, that he could not rely on Gulf & Western's alleged failure to disclose that the benefits were vested, by arguing that Pennsylvania law places no obligation on a purchaser to conduct an extensive investigation to ascertain the truth of the seller's representations. Although, in certain circumstances, the Pennsylvania courts have limited the extent to which a purchaser must go beyond the purchase documents in investigating the truth of a representation, *see, e.g., Silverman v. Bell Sav. and Loan Ass'n*, 533 A.2d 110, 115 (Pa. Super. Ct. 1987) (holding that in action for rescission of real estate sale purchaser has no obligation to examine public zoning records prior to a purchase), *allocatur denied*, 542 A.2d 1371 (Pa. 1988), the law is clear that a purchaser cannot rely on a misrepresentation that should have been readily apparent from the information provided to him by the seller. Thus, a purchaser is "required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a

cursory examination or investigation.'" *Bowman v. Meadow Ridge, Inc.*, 615 A.2d 755, 759 n.3 (Pa. Super. Ct. 1992) (quoting Restatement (Second) of Torts §541, comment a (1977)); *see also Scaife Co. v. Rockwell-Standard Corp.*, 285 A.2d at 455 ("'A misrepresentation as to the subject of a proposed sale will not support an action for deceit if the subject be open to the buyer's observation'" (quoting *Emery v. Third Nat'l Bank*, 162 A. 281, 283 (Pa. 1932))).

In this case, it is clear that Wittekamp should have recognized the need to inquire further as to whether the group health insurance had vested from reading the documents that were given to him.[9] Accordingly, although we express no view as to what the result might be under a lesser standard, we are persuaded that Wittekamp failed to adduce sufficient evidence that would allow a jury to find under the clear and convincing standard that he justifiably relied on the nondisclosure.

IV. *CONCLUSION*

In view of the aforesaid, the judgment of July 24, 1992, of the district court will be affirmed.

A True Copy:
Teste:

Clerk of The United States Court of Appeals
for the Third Circuit

---

9. Wittekamp repeatedly has contended that the sheer size of the obligation for health insurance, as compared to the price he paid for Mac-Hemp, demonstrates that he would not have purchased the company subject to vested medical benefits. Thus, for example, he explains in his reply brief, "It requires no leap of logic to conclude that a person does not spend ten million dollars for a company with a 11.1 million dollar obligation." But it is Wittekamp's contention that lacks logic. After all, a prudent purchaser might be delighted to pay $10,000,000 and assume an obligation of equivalent amount to acquire a company of a value in excess of the purchase price and the obligation assumed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3428

JOHN N. WITTEKAMP
v.
GULF & WESTERN, INC;
GULF & WESTERN INDUSTRIES1 INC.;
GULF & WESTERN MANUFACTURING CO.;
and WICKS MANUFACTURING

John N. Wittekamp,
Appellant

On Appeal From the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 89-471)

Present: Becker and Greenberg, *Circuit Judges*,
and Robinson, *District Judge**

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on March 2, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 24, 1992, be, and the same is hereby affirmed.

Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

*Honorable Sue L. Robinson, U.S. District Judge for the District of Delaware, sitting by designation.

ATTEST:

/s/ Court Clerk
Clerk

Dated: April 22, 1993

United States District Court

Western District of Pennsylvania

JOHN N. WITTEKAMP
v.
GULF & WESTERN, ET. AL

CASE NUMBER: 89-471

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict. by special interrogatories

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment is entered in favor of defendant Gulf & Western Inc., et. al., and against plaintiff, John N. Wittekamp.

IT IS FURTHER ORDERED that Judgment as a matter of law is in favor of defendant Gulf & Western, Inc. and against plaintiff, John N. Wittekamp.

APPROVED: /s/ Timothy K. Lewis
Timothy K. Lewis
U.S. District Judge

Date: July 24, 1992

Date: July 23, 1992

Clerk: /s/ Clerk

/s/ Deputy Clerk
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN N. WITTEKAMP,	)	Docket No. CA
	)	89-471
Plaintiff,	)	
vs.	)	Pittsburgh,
GULF & WESTERN, INC.,	)	Pennsylvania
GULF & WESTERN INDUSTRIES, INC.,	)	July 22, 1992
GULF & WESTERN MANUFACTURING,	)	
CO., and WICKS MANUFACTURING.	)	
Defendants.		

BEFORE THE HONORABLE TIMOTHY K. LEWIS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Louis M. Tarasi, Jr., Esquire
Joseph J. Hinchliffe, Esquire
Tarasi & Johnson PC
510 Third Avenue
Pittsburgh, PA 15219

For the Defendant: Michael A. Cardozo, Esquire
Marc J. Goldstein, Esquire
Proskauer Rose Goetz & Mendelsohn
1585 Broadway
New York, NY 10036

Now, at the close of the defendants' case in chief, the defendants moved pursuant to Rule 50(a) for judgment as a matter of law as to—well, they were jumbled together, and that is being generous, but the long and short of it is that the defendants moved for judgment as a matter of law as to the issues of fraud in the concealment of Exhibit 98, which made reference to the retirees medical benefits being vested, and in the affirmative misrepresentation which the plaintiff claims was set forth in Exhibit K.

The Court denied the defendants' motion as to affirmative misrepresentation and withheld a ruling on the issue of concealment until I had a chance to study the cases and the parties' positions again.

Now, the Court has reviewed the cases and the evidence that's been presented in this case and the Court has also gone back and reviewed the videotape of the arguments on the defendants' Rule 50 motion and the colloquy that occurred this afternoon, and that's why the Court is confident that, at best, the issues were fairly well confused and jumbled, but I have dissected them, segregated them, and I am now prepared to address them in a fashion I think that is appropriate.

First, let me note that Federal Rule of Civil Procedure 50(a) provides in pertinent part as follows: "If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, then the Court may grant a motion for judgment as a matter of law against that party on any claim that cannot under the controlling law be maintained without a favorable ruling on that issue.

Now, as I noted before, the Advisory Committee notes to Rule 50 also make it clear that any action taken under this rule is, in effect, a performance of the Court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations that are conferred on the jury by the Seventh Amendment or any other provision of law.

The Court was careful to address the distinction between the factual determinations that were invoked by some of the arguments made this morning, those matters that are subject to enforcement of the controlling law and appropriate for redress or to be addressed pursuant to Rule 50.

As I also noted before that with these standards in mind, if the Court finds that there is no legally sufficient evidentiary basis for a reasonable fact finder to find for the plaintiff, then the Court—the defendants' motion should be granted.

Now, upon a review of the arguments of the cases and of the applicable standard, the Court revises the issue of affirmative misrepresentations as to Exhibit 98 and reconsiders its earlier ruling. In doing so, I note that to establish an affirmative misrepresentation in this regard, the plaintiff must demonstrate by clear and convincing evidence that Gulf & Western, through its employees, in effect—not in effect, that Gulf & Western, through its employees, made a misrepresentation and that when Gulf & Western made that misrepresentation, they knew that it was untrue, or they knew—they did not believe that it was true or were indifferent as to whether it was true.

So that the plaintiff in this case, Mr. Wittekamp, will have to have established—would have to establish by clear and convincing evidence that individuals employed by Gulf & Western knew that the particular fact that was allegedly misrepresented or was not disclosed, that they knew of it, and in this instance, we are talking about Exhibit 98.

Now, on the record of this case, the Court must conclude that the evidence falls short of clearly and convincingly establishing that any employee at Gulf & Western in 1983 knew about Exhibit 98. Specifically, the Court finds that the mere fact that Ms. Beering in 1975 had Exhibit 98 in her files, which, incidentally, we don't know, does not clearly and convincingly establish that anyone, that any particular individual or any unidentified group of persons—that anyone at Gulf & Western in 1983 knew about it—knew about Exhibit 98.

The Court notes, as I have noted before, that Mrs. Beering did not testify in this case. And the record is devoid of any insight into what was done with Exhibit 98 at Gulf & Western after 1975.

There's just no evidence on that.

The Court further notes that intent, scienter is a prerequisite to finding an affirmative misrepresentation, and that if Gulf & Western did not know of Exhibit 98, and the evidence—there is no evidence to suggest other than the fact that it was in, apparently, in their files at some time in 1975 and was preserved there for—or somewhere, that is at Gulf & Western, for some period of time thereafter, that if Gulf

& Western did not know of Exhibit 98, there is no legally sufficient evidentiary basis for a reasonable jury to find for the plaintiff on the issue of intent to misrepresent under any theory of scienter. The bottom line is that the basic knowledge in this instance is lacking.

So the Court will grant the defendants' motion for judgment as a matter of law as to the issue of affirmative misrepresentation as it relates to Exhibit 98, and now I will turn to the issue of concealment, the concealment of Exhibit 98.

This issue is factually parallel to the underlying basis for the affirmative misrepresentation claim as to Exhibit K. Here the plaintiff has to establish—has to have established, that is, that by clear and convincing evidence, that is, that individuals who were employed by Gulf & Western concealed, intentionally concealed the particular fact—that is Exhibit 98—from Mr. Wittekamp for the purpose of causing injury to him or with knowledge that injury to Mr. Wittekamp was substantially certain to result.

The Court notes that fraudulent concealment in this context means intentionally preventing Mr. Wittekamp from discovering a material fact.

The element of intent is central in a case such as this which involves alleged fraudulent concealment. And intent in this sense involves a state of mind with which an act is done, in this case, of course, the act of concealment. It means the desire to bring about a particular result.

As is clear, a person acts intentionally in this context when that person, in this case someone on behalf of Gulf & Western, desires to cause the harmful consequences of the act or believes those harmful consequences are substantially certain to result from the act of concealment so that in the law, concealment does not consist of mere non-disclosure. Concealment instead consists of affirmative conduct by one or more individual persons that is intended to prevent another party, in this case Mr. Wittekamp, from learning the fact so that the other party, Mr. Wittekamp, will suffer harmful consequences.

On the record in this case, this Court cannot allow the plaintiff's claim of concealment with respect to Exhibit K to go forward. It is worth noting in this regard that the only — that only actual persons and not corporations can form the intent necessary to commit a fraud. The plaintiff has proffered no evidence to sustain a finding by clear and convincing — by the clear and convincing standard that is applicable to this case that Gulf & Western intentionally concealed Exhibit 98 from him.

To conclude otherwise would be to invite a verdict based on speculation and conjecture, and this court will not let that happen.

In fact, this court would feel compelled to overturn such a verdict, in any event. So that the plaintiffs—the defendants' motion for judgment of a matter of law on the issue of concealment is also granted.

Now, the plaintiff is also pursuing a theory of fraud against the defendant which is based on a failure to disclose. This is different from concealment and affirmative misrepresentation. And it is important to note that this claim does not have to do with events in 1983, but deals with a later attempt to—or a later claim of a failure to disclose. In particular, this claim by the plaintiff deals with the failure to disclose that the benefits were vested after Gulf & Western learned that Mr. Wittekamp was acting in reliance upon what might have been a past misrepresentation in that regard. That is the thrust of the plaintiff's theory of non-disclosure.

This claim will go forward. This claim will go to the jury.

Now, so that the defendants' motion for judgment as a matter of law to the extent that it involved, and the Court is a little unclear on that, because reviewing the videotape, it is difficult to discern whether or not the defendant was moving with regard to the issue of non-disclosure, failure to disclose, although Mr. Goldstein did make specific reference to non-disclosure, he was actually arguing concealment, whether he knew it or not. But in any event, that claim—the defendants' motion in that regard is denied and the issue of non-disclosure will go forward.

That leaves the plaintiff with a claim of fraud in being induced to come to work at Gulf or—Mackintosh-Hemphill and in the failure to disclose material facts post-1983, which on the evidence in this case appear to involve statements by Gulf & Western that the benefits were not vested when, in fact, they were vested. And that's where we are.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN N. WITTEKAMP,	)	Docket No. CA
	)	89-471
Plaintiff,	)	
vs.	)	Pittsburgh,
GULF & WESTERN, INC.,	)	Pennsylvania
GULF & WESTERN INDUSTRIES, INC.,	)	July 23, 1992
GULF & WESTERN MANUFACTURING,	)	
CO., and WICKS MANUFACTURING.	)	
Defendants.		

BEFORE THE HONORABLE TIMOTHY K. LEWIS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
Louis M. Tarasi, Jr., Esquire
Joseph J. Hinchliffe, Esquire
Tarasi & Johnson PC
510 Third Avenue
Pittsburgh, PA 15219

For the Defendant:
Michael A. Cardozo, Esquire
Marc J. Goldstein, Esquire
Proskauer Rose Goetz & Mendelsohn
1585 Broadway
New York, NY 10036

After hearing the plaintiff's and the defendants' arguments and after reviewing—after reviewing the citation that the plaintiff provided last night and, of course, the record in this case, including the plaintiff's previous filings, the Court concludes that the plaintiff's claim of non-disclosure, which the Court had previously understood to encompass certain omissions by Gulf & Western in 1983 which were ratified in 1987, fall short of the clear and convincing evidentiary standard which would otherwise govern. In particular, there is insufficient evidence of record that anyone at Gulf & Western knew that the benefits were vested until the settlement of

the Wernert action, and obviously, if the evidence would not allow a reasonable juror to conclude that anyone at Gulf & Western knew of this, and I emphasize the word knew, because, of course, is an underlying element, knew of this, then Gulf & Western could not be said to have failed to disclose it under the law.

More importantly perhaps, having reviewed the plaintiff's complaint, the plaintiff's pre-trial statement, the plaintiff's amended pretrial statement, the plaintiff's second amended pretrial statement and the pretrial stipulation, the Court finds that this claim was not articulated appropriately under Rule 9(b) in any event, and that to allow the plaintiff to, in essence, inject it into this case during this trial would be inconsistent with the specificity in pleading requirement that is mandated for fraud cases and which I discussed earlier.

Therefore and accordingly, defendants' motion for judgment as a matter of law as to the non-disclosure of the vested benefits is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN N. WITTEKAMP,	)	Docket No. CA
	)	89-471
Plaintiff,	)	
vs.	)	Pittsburgh,
GULF & WESTERN, INC.,	)	Pennsylvania
GULF & WESTERN INDUSTRIES, INC.,	)	July 15, 1992
GULF & WESTERN MANUFACTURING,	)	
CO., and WICKS MANUFACTURING.	)	
Defendants.		

BEFORE THE HONORABLE TIMOTHY X. LEWIS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
Louis M. Tarasi, Jr., Esquire
Joseph J. Hinchliffe, Esquire
Tarasi & Johnson PC
510 Third Avenue
Pittsburgh, PA 15219

For the Defendant:
Michael A. Cardozo, Esquire
Marc J. Goldstein, Esquire
Proskauer Rose Goetz & Mendelsohn
1585 Broadway
New York, NY 10036

The second grounds concerns the—the defendant claims that the retiree medical fraud claim should be dismissed as a matter of law. And I have reviewed the seven numbered paragraphs and footnotes, et cetera, that the defendants include. The defendants annunciate a number of bases which they claim would allow me to reach this conclusion. I reject all of them. The defendants' motion for judgment as a matter of law on the retiree medical fraud claim is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN N. WITTEKAMP,	)	Civil Action No.
	)	89-471
Plaintiff,	)	
vs.	)	
GULF & WESTERN, INC.,	)	
GULF & WESTERN INDUSTRIES, INC.,	)	
GULF & WESTERN MANUFACTURING,	)	
CO., and WICKS MANUFACTURING.	)	
Defendants.	)	

ORDER

AND NOW, this 1st day of April 1992, upon consideration of plaintiff's motion for summary judgment filed August 10, 1990, defendants' motion for summary judgment filed August 10, 1990, and the parties' submissions with regard to these motions,

IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment is **DENIED.**

2. Defendants' motion for summary judgment is **DENIED.**

IT IS FURTHER ORDERED that the parties are to submit memoranda addressing the issue of whether New York or Pennsylvania law applies to this case by April 20, 1992.

IT IS FURTHER ORDERED that:

1. Motions in limine, proposed voir dire questions, proposed points for charge and trial briefs are due on May 8. 1992.

2. Trial will begin on June 8, 1992 at 9:00 am. in Courtroom No. 11, Tenth Floor, U.S. Post Office and Courthouse, Pittsburgh, PA15219. Attorneys are instructed to report for trial not later than 30 minutes prior to this time. The starting time on the

first day of a jury trial may be delayed or moved up one hour because of the jury pooling.

Timothy K. Lewis
United Slates District Judge

cc: Louis M. Tarasi, Jr., Esquire
H. Woodruff Turner, esquire
Marc J. Goldstein, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN N. WITTEKAMP,	)	Civil Action No.
	)	89-471
Plaintiff,	)	
vs.	)	
GULF & WESTERN, INC.,	)	
GULF & WESTERN INDUSTRIES, INC.,	)	
GULF & WESTERN MANUFACTURING,	)	
CO., and WICKS MANUFACTURING.	)	
Defendants.	)	

MEMORANDUM OPINION

LEWIS, *District J.*

Plaintiff brought this two-count suit in order to recover for alleged misrepresentation and breach of contract on the part of the defendants. Both plaintiff and defendants have moved for summary judgment with respect to plaintiff's misrepresentation claim.[1] For the reasons which follow, this court will deny both motions.

Plaintiff alleges that in 1982, defendants induced him to relinquish his position as Chief Executive Officer and Chairman of the Board of a fire truck manufacturing company in western New York in order to become President of the Macintosh-Hemphill division of Gulf & Western Manufacturing Company ("Mac-Hemp"). Plaintiff became the division's president and invested personal funds in Mac-Hemp, forming a corporation to do so. That corporation is now in bankruptcy, due mainly to liabilities which, plaintiff contends, the defendants knew or should have known of but failed

1. In defendants' memorandum in support of their motion for summary judgment, the companies make a passing statement purporting to be a "motion" for summary judgment as to plaintiff's breach of contract claim. Because of the brief, conclusory nature of this statement and since the court has not been presented with adequate discussion of the issue by either party, the court will not consider the merits of this motion at this time.

to reveal to him. Plaintiff argues that defendants did not inform him of certain unfunded pension liabilities and vested retiree medical insurance benefits at the time he was hired as division president in 1982 and when he purchased Mac-Hemp. This, according to plaintiff, constituted a fraudulent or negligent misrepresentation of the state of the business. Plaintiff specifically alleges that defendants should be liable to him for inducing him to accept employment and to purchase the division once he became its president. Plaintiff asks this court to rule, as a matter of law, that he is entitled to summary judgment as to defendant's failure, whether fraudulent or negligent, to reveal vested retiree medical benefits as contemplated in the October 1983 sales agreement.

Defendants predicate their motion for summary judgment on the theory that plaintiff lacks any evidence which could reasonably support a jury verdict in his favor. Their brief states that because no legal conclusion about terminability of the retirement plan was ever reached or considered by the defendants, no material undisclosed fact ever existed. Def. Brief. p. 10. For similar reasons, defendants argue that no trier of fact could reasonably conclude that they concealed this alleged fact from plaintiff for the purpose of misleading him. Defendants maintain that the record contains no facts upon which reasonable jurors could conclude that plaintiff sustained any pecuniary injury proximately resulting from defendants' alleged nondisclosure. In sum, defendants contend that there is no evidence to support any of the requisite elements of a fraudulent concealment claim under applicable law.[2] Those elements include damages proximately caused by nondisclosure of a material fact and intent to mislead through such nondisclosure. *See e.g., Sebring v. Fidelity-Phoenix Fire Ins. Co.*, 255 N.Y. 382, 174 N.E. 761(1931); *accord Delehanty v. First Pennsylvania Bank. N.A.*, 318 Pa. Super. 90, 464 A.2d 1243 (1983).

---

2. While plaintiff moves for summary judgment based on an analysis of his case under Pennsylvania law, defendants contend that New York law applies to this fraud-in-the-inducement claim. Both states require identical elements in a fraud-in-the-inducement claim and therefore the distinction is not material for the purpose of deciding the motions presenlly before the court. In order to resolve this dispute, however, the court will issue an order calling for briefs on the choice of law problem.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment:

> [s]hall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on the file together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In Celotex v. Catrett, 477 U.S. 317 (1986), the Supreme Court expressed the view that summary judgment is properly entered after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322-24. The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to withstand a summary judgment motion; there must be evidence upon which the jury could find for the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Genuine issues of material fact which preclude summary judgment exist where a reasonable jury could return a verdict for the nonmoving party based on specific evidence contained in the pleadings or discovery documents. *Id.* at 248. Because a jury is particularly well-suited to deciding factual issues concerning a party's intent or the reasonableness of a party's conduct, such issues are generally not appropriate for summary adjudication by the court. *Matthews v. Ashland Chemical, Inc.*, 703 F.2d 921 (5th Cir. 1983); *Frey v. Woodard*, 748 F.2d 173 (3d Cir. 1984).

Plaintiff cannot prevail on the motion presently before the court. In order for plaintiff to succeed on his motion for summary judgment, this court would have to hold as a matter of law that defendants fraudulently or negligently failed to reveal the vested retiree medical benefits. For the reasons stated above, that determination is appropriately reserved for the trier of fact. Therefore, plaintiffs motion for summary judgment must be denied.

Turning to defendants' motion, the court is persuaded that summary adjudication should be denied because plaintiff has adduced sufficient evidence to create triable issues of fact with respect to the

essential elements of a fraudulent concealment claim. Although defendants contend that plaintiff has not offered evidence to suggest that anyone at Mac-Hemp considered or reached a conclusion about the terminability of the retirement plan, the failure of defendants to disclose that no notice of termination of the plan was received by the United Steel Workers ("USW") during the 1977-78 making the plan nonterminable—and affidavit testimony concerning oral promises of lifetime medical coverage constitute more than a "mere scintilla of proof," and therefore create a triable issue of fact as to whether any material undisclosed facts ever existed. In the court's view, a reasonable jury could conclude that defendants knew that plaintiff was acting on the basis of mistaken knowledge. To the extent that be was not informed that the USW had not received a termination notice or that defendants made oral promises to retirees regarding lifetime medical coverage, such a finding could be consistent with the plaintiff's theory of liability.

Finally, plaintiff's deposition testimony alleging that the liabilities arising from vested retirement benefits caused Mac-Hemp to file bankruptcy provides a reasonable basis on which a jury could conclude that defendants' conduct was the proximate cause of pecuniary losses suffered by plaintiff. On this point, the court notes, however, that only actual pecuniary losses may be recovered under a fraudulent nondisclosure claim. *Dress Shirt Sales. Inc. v. Hotel Martinique Assocs.*, 12 N.Y. 2d 339, 343 (1963); *Neuman v. Corn Exchange Nat'l Bank & Trust Co.*, 356 Pa. 442 (1947).

For the reasons stated in this opinion, defendants' motion is also denied. An appropriate order will follow.

Date: April 1, 1992

/s/ Timothy K. Lewis
Timothy K. Lewis
United States District Judge

cc: Louis M. Tarasi, Jr., Esquire
H. Woodruff Turner, Esquire
Marc J. Goldstein, Esquire

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3428

JOHN N. WITTEKAMP
v.
GULF & WESTERN, INC;
GULF & WESTERN INDUSTRIES INC.;
GULF & WESTERN MANUFACTURING CO.;
and WICKES MANUFACTURING

John N. Wittekamp,
Appellant

On Appeal From the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 89-471)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and ROTH, *Circuit Judges*, and ROBINSON, *District Judge**

The petition for rehearing filed by the appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

*Honorable Sue L. Robinson, United States District Judge for the District of Delaware, sitting by designation.

BY THE COURT:

/s/ Circuit Judge
Circuit Judge

DATED: MAY 24 1993

Rule 21. Briefs, the appendix, motions and other papers.

(1) Contents of briefs. The briefs of all parties shall be in accordance with the Federal Rules of Appellate Procedure 28 (c)–(i). The requirements of FRAP 28(a) and 28(b) for the briefs of appellant and appellee are modified for use in this Court to read as follows:

A. Brief of the Appellant or Petitioner. The brief of the appellant or petitioner shall contain under appropriate headings and in the order here indicated:

(a) A table of contents with page references.

(b) A table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(c) A statement of subject matter and appellate jurisdiction:

(i) If this is an appeal from the judgment of a court, the statement of jurisdiction shall contain:

(I) a statement of the subject matter jurisdiction of the court from which the appeal is taken; and

(II) a statement of this Court's appellate jurisdiction containing: a certification that the appeal is from a final judgment in accordance with 28 USC § 1291; or, if the appeal is from an action involving multiple claims or multiple parties, a certification that the final judgment applies to all claims or parties, or that the district court has made a proper express determination that there is no just reason for delay and an express direction for the entry of judgment under FRCP 54(b). An application for an appeal under 28 USC § 1292(b), Interlocutory Decision, shall include a statement of the specific "controlling question of law as to which there is substantial ground for difference of opinion."

(ii) If this is a petition to review or enforce agency action, the statement of jurisdiction shall contain a reference to the statute under which this Court has jurisdiction, and a certification that the agency action is a final order, or, if not, a statement of the basis for this Court's jurisdiction.

(d) A statement of the issues presented for review.

(e) A statement of the case. The statement shall indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below.

(f) A statement of the facts. The statement shall relate the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision FRAP 28(e)).

(g) A statement of related cases and proceedings, indicating whether or not this case or proceeding has been before this Court previously, and whether counsel is aware of any other case or proceeding, which is in any way related, completed, pending or about to be presented before this Court or any other court or agency, state or federal. If there are any previous or pending appeals before this Court arising out of the same case or proceeding, the statement should identify them, and the party shall file a separate statement with the Clerk's office before or at the same time as the brief is filed which identifies any previous or pending appeals arising out of the same case or proceeding.

(h) A statement of the standard or scope of review. The party shall clearly set forth within the argument or under a separate heading a statement of the standard or scope of review for each contention, e.g., where the appeal is from an exercise of district court discretion, a statement that the standard of review is abuse of discretion. Similarly, the appropriate standard or scope of review for other contentions should be indicated, e.g., where the contention is that the district court erred in formulating or applying a legal precept; or that there is insufficient evidence to support a verdict; or that fact findings of the trial judge are clearly erroneous under FRCP 52(a); or there is lack of substantial evidence in the record as a whole to support a factual finding of an administrative agency, or that the agency's action, findings and conclusions should be held unlawful and set aside for the reasons set forth in 5 USC § 706(2).

(i) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, the reasons for each contention, with citations to the authorities, statutes and parts of the record relied on. Citations to cases which have been reported shall be to the United States Reports, the Federal Reporter, Federal Supplement or Virgin Islands Reports and shall contain the identity of the Judicial Circuit, District, and year of decision. Citations to

the United States Supreme Court cases which have not yet appeared in the official reports should include the month, date and year of decision or a reference to United States Law Week. Citations to federal decisions which have not been formally reported should identify the court, docket number and date. Citations to services and topical reports, whether permanent or looseleaf, shall not be used if the text of the case cited has been reported in the United States Reports, United States Law Week, Federal Reporter, Federal Supplement or Virgin Islands Reports. Citations to state court decisions should be to the West Reporter system wherever possible with an identification of the state court.

(j) A short conclusion stating the precise relief sought.

(k) A certification in the initial brief filed by each party with the Court that at least one of the attorneys whose names appear on the brief is a member of the bar of this Court, or has filed an application for admission pursuant to Rule 9(1).

(l) If the court by order has dispensed with the requirement of an appendix pursuant to rule 10, the appellant's brief shall contain:

(i) the relevant docket entries in the proceedings below;

(ii) the judgment, order or decision in question;

(iii) the memorandum or opinion of any court or agency subject to review; and

(iv) the notice of appeal.

(m) In the event only four copies of the appendix are filed (see Local Rule 10[1]), the appellant shall annex as an addendum to his brief the district court opinion or statement of reasons giving rise to the order and judgment from which the appeal has been taken, or the statement of reasons and decision of the administrative agency for which review is sought. [Added 9-24-85.]

B. Brief of the Appellee or Respondent. The brief of the appellee or respondent shall conform to the requirements of subdivision A(a)–(m), except that a statement of the issues, of the case or of the facts need not be made unless the appellee is dissatisfied with the statement of the appellant. Where the appellee has been permitted to file one brief in consolidated appeals, the consolidated brief shall contain an appropriate cross reference index which clearly identifies and relates appellee's answering contentions to the specific

contentions of the various appellants. The index shall contain an appropriate reference to the question raised and the page in the brief of each appellant.

[Amended 10-3-83.]

(2) Form of briefs, the appendix and other papers.

A. Briefs and the appendix.

(a) Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis and only where Xerox or equivalent duplicating processes are not available. All printed matter must appear in at least 11 point type on opaque, unglazed paper. See Rule 10(3) for contents of appendix.

(b) All briefs, appendices, motions and other papers shall be firmly bound at the left margin. Any metal fasteners or staples must be covered.

(c)(i) Briefs and appendices produced by the standard typographic process shall have pages 6¼ by 9¼ inches and type matter 4-1/6 by 7-1/6 inches.

(ii) Briefs and appendices produced by any other process shall have pages not exceeding 8½ by 11 inches and type matter not exceeding 6½ by 9½ inches, with double spacing between each line of text.

(iii) Lines of typewritten text shall be double spaced. Carbon copies may be used for filing and service if they are legible.

(d) In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.

(e) Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

(f) Except where the litigant is in forma pauperis, the cover of the brief of the appellant will be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, will be white. Where a transparent cover is utilized,

the underlying sheet must nevertheless conform to these color requirements.

(g) The front covers, or the underlying sheet if a transparent cover is utilized, of the briefs and of appendices, if separately printed, shall contain: (1) the name of this court and the number of the case; (2) the title of the case (see FRAP 12(a)); (3) the nature of the proceeding in the court (e.g., Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

(h) Unless otherwise required by the Court, ten (10) copies of each brief shall be filed with the Clerk and two (2) copies served on counsel for each party separately represented. Where hearing or rehearing by the Court en banc is ordered, the parties will be directed to file sufficient copies for the Court's use. [Added, effective 9-8-82.]

(i) Videotape record of trial court proceeding.

(i) Record on Appeal. For purposes of implementation of the experiment approved by the Judicial Conference of the United States on the use of video recording equipment for making the official record of court proceedings, the record on appeal from those district courts in this circuit participating in this experiment shall consist of the certified videotape recording(s), the videotape log, and up to fifty (50) pages of typed transcript prepared from the official videotape by an official transcription service. Except for these fifty (50) pages, the record on appeal shall not contain a typed transcript of the proceedings unless otherwise ordered by the district court or this court because an equipment failure or other technical problem has resulted in an incomplete videotape record. The audiotape backup electronic sound recording or stenographic notes, if any, shall not be used for any purpose except in the event of equipment failure or technical problem, and then only by order of the court.

(ii) Order for Videotape. In appeals involving district court cases participating in the videotape experiment, the appellant shall submit to the district court clerk, within ten

(10) days of the filing of the notice of appeal, a written order requesting, in lieu of parts of the transcript from the reporter, a certified copy of such parts of the videotape recording as the appellant deems necessary for purposes of appeal. The order shall be accompanied by the payment of the required fees, except where the requesting party has been declared indigent. A copy of the written order shall be submitted to the Clerk of this court at the time the videotape is ordered. If no certified copies of videotapes are to be ordered for purposes of appeal, the appellant shall file a certificate with the clerk to that effect in the manner provided by Rule 10(b)(1), F.R.A.P. If the appellee deems other parts of the videotape recordings to be necessary, the appellee shall, within ten (10) days of the service of the order or certificate of the appellant, file and serve on the appellant a designation of additional parts to be included, in the manner provided by 10(b)(3) F.R.A.P.

(iii) Identification of Tape. Any certified copies of videotapes obtained from the district court for submission to this court must be identified in the manner prescribed by the clerk of the district court and shall include: a designation of the judicial district, the district judge's initials, the last two digits of the current year, the letters "VCR", the number assigned to the videotape by the district court clerk, the caption of the case in which the proceedings are recorded, the district court docket number assigned to the case, and the date on which the videotape was recorded.

(iv) Appendix. In such appeals, four (4) copies of the videotape recording or relevant portions thereof, shall be submitted in lieu of any typed transcript as part of the joint appendix. The complete videotape log shall be included in each joint appendix. Each citation to a portion of a videotape in a brief or other paper filed in this court shall set forth in parentheses the word "tape", the number of the videotape, and the month, day, year, hour, minute and second at which the reference begins as recorded on the videotape. For example: Tape No. 1; 12/02/88; 13:24:06.

(v) By Order of Court of Appeals. In extraordinary circumstances, the court may direct the parties to arrange to have a typed transcript of any portion of the official video-

tape recordings pre pared by an approved transcription service, as deemed by the court necessary for a determination of the appeal.

(vi) Costs. Costs of videotape and those typed transcripts authorized by court order will be allowed in the same manner as provided in Rule 39(e), F.R.A.P.

(vii) Transcript in Addition to Videotape. A typed transcript of not more than (50) pages prepared from the official videotape by an official transcription service may be included in the appendix in addition to any videotape.

(viii) This rule is inapplicable in death penalty cases and in appeals involving a pro se party.

[Added 5/10/91.]

B. Motions and other papers.

(a) Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 81d by 11 inches in size. A motion or other paper addressed to the court shall contain a caption setting forth the name of this court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper. Briefs and memoranda supporting or opposing motions need not comply with (f) supra.

(b) Petitions for rehearing shall be produced in the manner pre scribed above. Where petitioner is represented by counsel, the petition shall contain the "Statement of Counsel" required by Rule 22.

(3) Filing of motions, briefs, and papers relating to grandjury matters.

(a) In any appeal, motion or other proceeding relating to a grandjury investigation, the petitioner or appellant may file pleadings, briefs and other papers using initials or a John or Jane Doe designation to avoid disclosure of the identity of the applicant or the subject matter of the grand jury investigation. All responsive pleadings, briefs and other papers shall follow the same format until further order of the court.

(b) In matters relating to grand jury investigations, petitioner or appellant may file a motion requesting permission to file a brief sealed in whole or in part.

(c) Motions, briefs and any other papers related to any grand jury investigation which were filed with the district court pursuant to an order of impoundment, and which constitute part of the

record transmitted to this court, shall remain subject to the district court's impoundment order and will be placed under seal by the Clerk of this Court until further order of this court.

(4) Unacceptable motion, brief or appendix. If a motion, brief, or appendix submitted for filing does not comply with this rule and Federal Rules of Appellate Procedure 28, 29, 30, 31, and 32 (as modified by this Rule), the Clerk shall not accept it and will return the motion, brief or appendix to the party, citing this rule and indicating to the defaulting party wherein he has failed to comply. If the court shall find that the provisions of this rule have not been adhered to, it may, in its discretion, impose sanctions as it may deem appropriate, including but not limited to the dismissal of the appeal, imposition of costs or disciplinary sanctions upon counsel.

Federal Rules of Appellate Procedure Rule 11(b)

Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.